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Cape of Good Hope. Supreme Court

"CAPE TIMES" LAW REPORTS.

A RECORD

OF

EVERY MATTER DISPOSED OF IN THE SUPREME COURT, DURING THE YEAR, 1891.

EDITED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE SUPREME COURT.

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ERRATA.

In the Estate of the late J. P. Tiran—page 98—Omit in 6th line of head—note, and in first line of judgment (p. 99) the words *the widow and*.

In seventh line from bottom of page 98 read *daughter* for widow.

At page 153 in 18th line from top (second line of judgment) read *appeal* for fee.

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT
(IN CHAMBERS).

TUESDAY, JANUARY 6.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice SMITH.]

IN THE ESTATE OF THE LATE JOHANNES A. LAUBSCHER.

Minors—Application to draw from S. A. Association sufficient funds to provide for maintenance and education.

This was an application by the administratrix of an estate for authority to pay out a certain sum of money to enable her to send one of the minor heirs to school.—Mr. Castens, who appeared in support of the application, stated that the deceased by his will bequeathed certain property to two children, subject to a life interest in favour of the applicant, his widow. The South African Association held a sum of ever £1,000, for the benefit of the minors, and the applicant being desirous of sending one of them to school for two years, asked for authority to draw £208 for that purpose. In reply to the Chief Justice, the learned counsel stated he believed the applicant wished to draw the full amount at once, but he was not aware to what school it was intended the minor should be sent.

The matter was referred to the Master for the purpose of ascertaining what annual payment should be allowed for the proper education of the minor.

GRAAFF V. KLERCK.

Lease—Executable—Judgment—Act 19 of 1864—Practice.

Mr. Schreiner applied for an order declaring the rights of the respondent under a certain lease entered into between the applicant and respondent jointly, executable for a judgment in a suit between the parties. Mr. Schreiner stated that the judgment in question was obtained in respect to the non-payment of rent upon a piece of ground which was leased by the parties under Act No. 19 of 1864 from the Government, subject to certain stipulated conditions, one of which was that the lease could not be transferred without the consent of the Government.

The Chief Justice remarked as the ground had been leased subject to certain stipulations it would depend upon the terms of the lease whether it was an executable lease or not. His Lordship asked whether the Registrar had been applied to for a writ of execution?

Mr. Schreiner replied that he was not aware.

The Chief Justice asked why, if the lease was executable, the Court should be asked to interfere, and if it was not executable, why should it be asked to do so?

Mr. Schreiner said he had not been instructed upon that point, and unfortunately his attorney was not in court.

The Sheriff (Mr. H. Tennant), in reply to a question from the Chief Justice as to whether any application of this kind had been made to him, replied in the negative.

The Chief Justice said, supposing an application was made for the attachment of the lease of ground held under similar conditions to these, whether it would be granted?

The Sheriff said he should like to consider the question before answering.

The Chief Justice inquired whether such a lease could be sold as one of the rights of the parties?

The Sheriff replied it would first of all have to be attached by an order of the Court. According to the instructions which had been issued, rights of this kind were never attached without an order of the Court.

The application was ordered to stand over until the 12th instant.

IN THE ESTATE OF THE LATE JOHN WRIGHT, M.D.

Mortgage of landed property to meet calls on shares in bank in liquidation.

Mr. Castens applied on behalf of the executors in this estate for permission to raise a sum of money on the mortgage of landed property in the

estate, for the purpose of meeting calls upon shares in the Cape of Good Hope Bank. The petition stated that the estate was liable for calls upon shares in the Cape of Good Hope Bank to the amount of £3,150, and that for the purpose of meeting that sum an attempt had been made to sell a portion of the landed property known as Stewartaville, but that the highest bid which was made was £1,100. The property had cost £2,787, but at the present time it was impossible to obtain a fair price for it, and it would be an advantage to all concerned if the property remained in the estate. The executors were therefore desirous of raising £1,000 upon mortgage, which would be sufficient, with the funds now in their hands, to pay the calls.

The required order was made.

THE PETITION OF ROSINA E. RUSSOUW.

This was an application by a married woman for a rule *nisi* calling upon her husband to show cause why she should not be allowed to sue *in forma pauperis*, and by edictal citation, for a divorce. The required order was granted.

CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Company—Bank in liquidation—Compromises—Confirmation postponed *sine die*.

Mr. Searle moved, on behalf of the liquidators of the Cape of Good Hope Bank, for the postponement, *sine die*, of an application for the confirmation of certain compromises which it had been proposed by them should be accepted. The learned counsel explained that the application was made owing to the existence of claims against prior shareholders, which claims might be affected if the compromises were sanctioned without their having been consulted.

The order was made as prayed, and their lordships adjourned.

SUPREME COURT.

MONDAY, JANUARY 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

ADMISSION.

Mr. Charles George Ward was admitted as advocate, on the motion of Sir Thomas Upington, Q.C.

PROVISIONAL ROLL.

K. LITHMAN & CO. V. DAVIDSON MORRIS.

The final order of adjudication of the defendant's estate as insolvent was granted.

MOLLER V. ASKEW.

This matter was ordered to stand over until the 18th January.

THE WESTERN PROVINCE BANK V. D. H. MALHERBE.

Provisional sentence for £450 on a promissory note, less £10 paid on account, was granted, subject to the production of a translation of the note, which was in Dutch.

THOMAS V. F. J. BOOSE.

The final order of adjudication of the defendant's estate as insolvent was granted.

FAIRBRIDGE & ARDERNE V. W. J. COPELAND.

Judgment for £205 18s. 6d. was granted against the defendant in default of his appearing.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Stephanus Petrus Louw, Johannes Hendrik Russouw, Elias Schrenk, Lewis Tilney, Alewyn Petrus van Heerden, Wentzel Christopher Whitehead, Mattheys Cornelis Lotter, Alfred Alexander, Jacobus Petrus de Wet, Johannes Christian Hendrik de Wet, Stephanus Janse Hendrik de Swardt, Izaac Arendse, J.son, and Christian Rudolf Leibenberg.

GENERAL MOTIONS.

CAPE OF GOOD HOPE BANK (IN LIQ.) V. C. M. VOWELL.

Attachment of funds in hands of agent—Proper form of process is to sue out execution.

Mr. Searle prayed for leave to attach certain funds belonging to the respondent and now in the hands of G. W. Steytler, for the purpose of satisfying certain calls on shares in the above bank, of which respondent was the registered owner. Vowell was in England, and G. W. Steytler held his general power of attorney. He owned fifty

shares. Steytler now held a certain amount of cash belonging to the respondent. The order was granted, the Court intimating that it would not grant a similar order again, the proper form of process being to sue out execution.

GRAAF V. KLERCK.

Mr. Schreiner moved in this matter, stating that it had been partially heard in Chambers last week. It was an application to have the rights of one H. J. W. Klerck under a certain lease declared executable. The lease contained a clause stating that it was not transferable, nor could there be any sub-lease unless the Government consented. It was ordered that the lease be sold to the highest bidder whom the Government would consent to take as a lessee.

MALCOLM V. PRINGLE.

In this matter the return day of the edictal citation was extended, on the motion of Mr. Schreiner, to 2nd February, 1891.

TAYLOR AND SYMONDS V. SCHUNKE.

Attachment of property *ad fundandam jurisdictionem*—Issue of Summons before rule *nisi* had been granted—Rule discharged.

In this matter, Mr. Searle appeared for the applicants and applied to have a rule *nisi*, granted on 20th December last for the attachment of certain farms in Maclear, for the purpose of founding jurisdiction, set aside.—Mr. Schreiner appeared for the respondent.—Lengthy affidavits were read denying the existence of any liability by Taylor and Symons to the respondent, stating that he had been asked to furnish accounts and deliver certain title deeds but refused to do so, and that an action had been brought to compel him to do so. It appeared that the summons was issued before the granting of the rule, and Schunke must have known of it.—After hearing counsel the rule was discharged, the Chief Justice remarking that the fact that the summons had been issued and service effected should have been mentioned in the original affidavit. It might have stopped the granting of the rule *nisi*, and certainly would have modified it. Schunke having withheld material information the rule would be discharged.

IN THE ESTATE OF THE LATE J. W. GLYNN.

Mortgage—Raising of loan by.

On the motion of Mr. Searle, the Court ordered the raising of a loan on mortgage of certain property in the same. The amount to be £900, and a bond of £400 to be paid off from this. The other £500 to be used for certain alterations in drainage, &c., ordered by the Town Council.

PETITION OF M. L. NELSON.

Funds belonging to person reputed to be dead in hands of Trust Co.—Application for payment of—The proper course is to appoint an executor and administer the estate as of a deceased person.

Mr. Juta moved for and obtained an order authorising the South African Association to pay out the sum of £26 5s., moneys belonging to one J. W. Nelson, who disappeared in 1865, then being sixty-five years of age, and had not been heard of since.—The Court, in granting the order, remarked the sum was small, but in similar cases where the amount was larger the proper course would be to appoint an executor and administer the estate as of a deceased person.

CAPE-TRANSVAAL GOLD-MINING ASSOCIATION.

The liquidator's report in this case was confirmed, authorising a call of 2s. 6d. per share, and the Court ordered the sum of £50 to be paid to the liquidator for his services.

THE UNION BANK (IN LIQUIDATION).

Mr. Schreiner presented a list of compromises to the Court, which were confirmed.

LOPEZ V. LOPEZ.

Mr. Shiel for the plaintiff; defendant in person. This was an action brought by the husband to obtain a decree of divorce by reason of his wife's adultery. The marriage was admitted, and evidence was led showing a suspicious intimacy between the wife and one Silver. Two witnesses also gave evidence strongly supporting the allegation of adultery.—The decree of divorce was granted.

WILSON V. WILSON AND ANOTHER.

Mr. Molteno moved to have the rule *nisi* made absolute, allowing this suit to be brought *in forma pauperis*.

MORGAN AND COLTMAN V. EXECUTORS OF GREWER.

Will—Construction—"Absolute right" or "Defined interest."

This was an appeal from the High Court of Griqualand West.

Sir Thomas Upington, Q.C., and Mr. Searle appeared for the Appellants.

Mr. Schreiner and Mr. Webber for the Respondents.

It was an action brought under the will of the late Mr. Grewer, of Kimberley, in which the present respondents were plaintiffs. The question was whether the appellants had received an absolute right to, or merely a defined interest in, a certain butchery business in Kimberley. The Court below held they had merely received a defined interest in it. After hearing Sir Thomas Upington, and without calling upon Mr. Schreiner, the appeal was dismissed, the Court holding that the judges of the Court below had taken a correct view of the will and codicil. Costs were ordered to be paid out of the estate.

SUPREME COURT.

MONDAY, JANUARY 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY v. ROULIOT.

Support adjacent and subjacent—Lease of diamondiferous claims—Trespass—Act 19 of 1883—In the absence of stipulation to the contrary in a lease the right to lateral support exists as a natural right incident to the lessor's land.

The Attorney-General and Mr. Searle for the Appellants.

Sir T. Upington, Q.C., and Mr. Schreiner for the Respondent.

The following judgments were delivered in this appeal which was argued last term:

The Chief Justice: This Court is much indebted to Mr. Justice Solomon for the clearness with which he has stated the facts of this case, and expounded the law bearing on those facts. He found it to be established by the evidence that the defendant, as lessee from the plaintiff company of claims in the Du Toit's Pan Mine, extending on the north to the margin of the mine, had in March and April, 1888, removed a ledge of reef on the plaintiff company's land from the margin of the mine. It is this removal of reef which constitutes the alleged trespass complained of in this action, and the main, if not the sole, object of the present appeal is to obtain a reversal of the judgment of the Court below, by which such removal has been held not to constitute a trespass. The Court below found that, in the course of working down his claims, the defendant had left a sloping buttress of blue ground as a support against the reef or margin of the mine, and that the effect of removing this buttress would have been that the reef would become dangerous, and in a few months fall into the defendant's claims. The Court further held that the defendant would have been justified in removing the buttress, and that, inasmuch as the result of such removal must be to make the reef dangerous, he was justified in anticipating the danger by first removing a portion of the reef at the back of the buttress. It will be necessary, therefore, to consider three questions, viz.: first, what is the exact legal position of the defendant towards the plaintiff company; second, is the defendant entitled to remove ground from within his own claims without regard to the effect which such removal may have upon the adjoining land belonging to the plaintiff company; and third, if the defendant is so entitled may he go a step further and break down from the adjoining land such ground as would, if unremoved, prove an obstacle to his removing the supporting ground from his own claims by the open system of mining. The answer to the first question depends upon the terms of the lease made in favour of the defendant on the 26th of August, 1886. The lessors grant, demise, and lease the claims, "with full and free liberty, licence and authority to the lessees to dig and search for diamonds and precious stones in such claims, subject to, and in accordance with, the rules and regulations now in existence, or which hereafter may be made by the Government, for the management of mines of this class within this colony." No rules or regulations affecting the points in dispute have been produced or relied upon, nor does the jurisdiction of the Mining Board enter into the consideration of this case, as it did in another case recently decided by this Court. The Inspector of Claims, in his evidence, said that there is a regulation of the Mining Board dealing with the working of reef which has been declared dangerous by the Mining Board, but he did not say that the reef in question had been so declared dangerous, nor did he produce the regulation. Subject to any duly-made mining rules and regulations, the relation between the plaintiff company and the defendant is that of lessor and lessee for a term of five years, with a perpetual right, on the part of the lessee, his heirs and assigns, to renew the lease so long as he or they perform the covenants thereof. The lessee, however, has far larger rights than the ordinary lessee of land, for he may dig

and search for diamonds in his claims, and he may, under the articles of agreement bearing the same date as the lease, remove the soil from the claims to depositing floors outside the mine which are provided by the plaintiff company for the purpose. So large are the rights of the claim-holders that they are referred to in Act 19 of 1883 as owners, but, as was pointed out in "London and S.A. Exploration Company v. Bultfontein Mining Board" (7 Juta, 49), the Legislature did not intend to confer upon them absolute rights of ownership. What they own is the right to dig for and keep the diamonds and precious stones found. For that purpose the claims are subject to a burthen analogous to a servitude, but instead of the burthen being due, as in the case of prædial servitudes, to the proprietor or occupier, as such, of another tenement, it is due to the lessee or occupier himself of the claims. For the due and efficient exercise of his mining rights the lessee, as I have already remarked, may remove ground from his claims, and the next question is whether such right of removal is limited by any right on the part of the plaintiff company, as owner of the adjacent land, to support for such land from lateral pressure. The question whether the right to such support is recognised by our law has been left undecided in previous cases in which it has been discussed in this Court, but it ought no longer to be left in doubt. The theory of the law is that the owner of land owns it upwards to the skies and downwards to the centre of the earth, but it is obvious that his exercise of the rights of ownership are practically confined to the surface and its neighbourhood above and below. Even at or near the surface his rights are not unlimited, for they must be exercised with due regard to the corresponding rights of the owners of adjoining lands. He cannot, for instance, abuse his rights by creating a nuisance on his land which is dangerous to the health of his neighbour. If a perennial stream of water flows over his land the water is, in theory of law, considered part of his land, but he cannot, by appropriating all the water, deprive the lower proprietors of that reasonable use to which the natural position of their land equally entitles them. On the other hand, the lower proprietor must also accept the disadvantages attending the position of his land, and may not, as pointed out in "Ludolph v. Wegner" (6 Juta, 193), dam up the water so as to throw it back to the injury of the upper proprietor. The upper proprietor in the one case, or the lower proprietor in the other, may deem it most essential for the improvement and cultivation of his own land to appropriate or dam up all the water, but if, in so doing, he trenches upon the corresponding rights of his neighbours the law steps in with the rule: "Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat." This rule, within reasonable limits, is of wide application. It is obvious that if my neighbour were allowed to dig a deep trench within an inch of my boundary he would have it in his power seriously to disturb my rights of ownership. To prevent such a disturbance minute regulations were laid down as early as the days of Solon for the guidance of Athenian conterminous proprietors. A law enacted by Solon reads as follows: "If anyone affixes a fence in his ground near to another man's land let him not trespass the boundary-line; if a walled enclosure, let him leave the space of a foot; if, however, a house, two feet; if he digs a grave or a trench let him leave as much space as the depth; and if a well, let him leave the width of a pace." This law, according to Gaius (Dig. 10, 1—13), was taken over in its entirety into the body of Roman laws. Groenewegen, in his commentary on the text, speaks of the law as obsolete, but only because, in his time, special provisions existed in different parts of Holland defining the spaces which conterminous proprietors must leave between buildings. Neither he nor Voet (10, 1—12) refers specially to trenches or other excavations, but, the principle as to the right of support being once admitted, the removal of such support followed by damage must have been a wrong for which the action *in factum* lay. It is certainly an extraordinary circumstance that there should be such a dearth of authority in the Dutch law-books upon this question of lateral support. The question has probably never been one of practical importance, seeing that there are no mines of any extent in Holland, and the necessity for deep excavations must seldom have arisen. In the absence of direct authority, this Court may well be guided by well-established principles of the Roman law and of modern systems of law, provided they do not lead us to conclusions inconsistent with the Dutch law. The Code Civile of France (Art. 674), following the Roman law, enacts that "whoever digs a well or ditch near a wall . . . . . must leave the space prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbour." In commenting upon this article, Pardessus says: "By purity of reasoning, the owner of land who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbour, and continue to excavate perpendicularly, because his neighbour's land, thus deprived of support, would be in danger of falling in." The law of Scotland was discussed by the House of Lords in "Caledonian Railway Company v. Sprat" (2 MoQ. 449), and Lord Cranworth, in giving his judgment, said: "If I am right in saying that by his conveyance Mr. Sprat conveyed to the company, not only the land to be covered by the railway, but also, by implication, the right to

all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. . . . I may add that the subject of the right of the owners of the surface to adequate subjacent and adjacent support has, on several recent occasions, been discussed in the English Courts. The principles which there govern the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scotch, and, I believe, to every other system of jurisprudence." In England no department of law has received more careful consideration from the Courts than that which relates to the relative rights and obligations of the owners of the surface and the owners of mining rights. All-important though the different mining industries there are to the wealth and prosperity of the country, the rights of the owners of the surface to support from adjacent as well as subjacent land have always been carefully guarded. The subject was incidentally discussed in the late Appeal Court of this colony in "Murtha v. Von Beek" (1 Buch. Ap. Ca. 121). That, however, was a case in which the relative rights *inter se* of the claimholders in a diamond mine were in question, and it was held that they were not entitled to the common law right of lateral support as against each other. The decision was founded upon the admitted practice of the diggers from the commencement of their common enterprise, and upon a previous decision of the Appeal Court to which I was not a party. In the subsequent case of the "Griqualand West Company" (1 Buch. Ap. Ca. 263), I pointed out the difference between claimholders and the present plaintiffs, who, as owners of the soil, did not hold themselves out as diggers, and I remarked that the Court would not be justified in straining the law so as to place the plaintiffs on the same footing, in regard to the liabilities attaching to their land, as the claimholders. It is clear, therefore, that the case of "Murtha v. Von Beek" offers no precedent for decision as to the rights of others than claimholders. In the subsequent case of "McFarland v. De Beer's Mining Board (2 H. C., 398) the High Court of Griqualand held that as between the owners of the adjoining properties, Bultfontein and Vooruitzicht, both of whom had issued licences for mining on their respective properties, they were entitled to lateral support from each other's land. "Is there anything," said Jones, J., "in the mere fact that the licence is for the purpose of mining, which changes the legal rights these owners possessed? I confess I cannot see in what manner this would make a difference." In the present case we have to consider the rights of the lessors—the owners of the land surrounding the claims—as against the lessee, the holder of those claims. The important circumstance in favour of the claimholders' alleged right to remove the lateral support from the margin of the mine is that the lease itself, read by the light of the articles of agreement, gives them the right to remove the soil from their claims on to the depositing floors for the purpose of winning their diamonds. "That being so," said Mr. Justice Solomon, "can it be maintained that the principle of lateral support can be made to apply to a case like the present? The nature of the tenure of the claims is to work them down; the owners of the soil lease the claims for that specific purpose; the natural result of so working the claims is to deprive the adjoining land of lateral support; and it appears to me, therefore, that this tenure is quite inconsistent with the right to lateral support which is now claimed by the plaintiff company. Had the company at the time when they granted the claims in the mine really intended that the surface of the ground outside of the mine should be preserved in its natural condition I think they would have expressly stipulated for this in the contracts which they made with the claimholders." There is certainly much force in this reasoning, but, after anxious consideration of the whole case, I am of opinion that the reasoning is not conclusive. If the right to lateral support exists as a natural right incident to the plaintiffs' land—as in my opinion it does—the parties to the contract must be deemed to have contracted with a view to the continued existence of that right. If they had intended that the plaintiffs should be deprived of this natural right ought not the defendant to have stipulated to that effect? I am of opinion that in the absence of such a stipulation the presumption is in favour of an intention to preserve a well-established natural right of property rather than to part with such a right. What was intended to be removed was the soil in the claims and not the soil surrounding the claims, and if the claimholders find that it is impossible for them to remove the soil within the margin without disturbing the soil beyond, they have only to abandon their claims as being no longer workable. The Court has never gone so far as to hold that there is any obligation upon claimholders whose claims serve to support the surrounding non-diamondiferous ground to work down such claims. The leases are renewable, but the lessees are not bound to renew them, whereas the lessors are bound to renew so long as the lessees are willing to perform the covenants. The arguments are certainly very evenly balanced, but upon the whole I am of opinion that independently of mining regulations, none of which have been put in, or of special mining customs, none of which have been proved, the right given to the defendant to win diamonds from the claims must be taken to be subject to the plaintiff company's right of support. If I am correct in this view it would follow that the defendant was not justified in

working down any portion of the reef in anticipation of the danger which would ensue from his removing the buttress supporting the reef. But in view of the strong arguments in support of the defendant's right to remove the support it would be well to consider the third question, viz., whether, assuming such right to exist, the defendant can, before removing the diamondiferous soil which acts as a support to the margin of the mine, anticipate the danger from reef falling into his mine by removing the reef of which that margin consists? Upon this question Mr. Justice Solomon says: "It would be absurd to hold that the defendant in working down his claims might, by removing the lateral support from the margin of the mine, cause the ground to fall into the mine, but that he had no right to go upon the plaintiff company's land in order to remove the danger. Once granted that there is no right to lateral support, it seems to follow, as a matter of course, that the defendant is entitled to do all necessary work upon the margin of the mine in order to prevent a fall of ground into his claims and the probable stoppage of his works." He then refers to a *dictum* of mine in the Griqualand West Company's case, which I have already cited, to the effect that it might fairly be taken that the owners had admitted the right of the claimholders to remove obstacles from the owners' own claims to the proper working of other claims. It would perhaps have been wiser on my part not to have uttered an unconsidered *dictum* which was not required for the elucidation of the case, but I am by no means satisfied that the *dictum* itself was unsound. In a previous portion of the judgment I had referred to the distinction between owners and diggers and between the mine itself and the land surrounding it. A recognised practice had existed under which "when a claim had been abandoned the owners of the adjoining claims had the right to work down those abandoned, and then to register a lien for expenses against those claims," and it was in reference to this practice as much as to the terms of the lease that my remark was made. The resumption of a diamondiferous claim by the company does not impose on the company the duty of becoming active miners, but may well subject them to the passive obligations to which the previous holder of the claim had been subject. I cannot, however, agree with the view of the Court below that "if a claimholder was justified in going upon the plaintiff company's claims in order to remove danger it would follow *a fortiori* that he would have the right to do similar work on the non-diamondiferous reef at the margin of the mine." The sole and ostensible object of the lease of claims is to permit of their being worked down in the search for diamonds, and the danger of any such leased claims being allowed to stand as a *menace* to the adjoining claims could not have been contemplated by the parties to the leases. But nothing is said in the leases as to the land surrounding the claims, although the parties must have known that sooner or later it would, unless sufficiently supported, menace the adjoining claims. I confess I do not perceive the absurdity of holding that the defendant may remove lateral support from the margin of the mine and yet may not go upon the plaintiffs' land for the purpose of breaking down the margin itself. In removing such support he commits no trespass, but only takes away what, according to my present assumption, his lease authorises him to take away. In breaking down the reef without the owner's consent he commits a trespass which nothing but absolute necessity can justify. An obligation arising from necessity cannot be enlarged beyond what necessity requires. Where a person lets a portion of his land with no outlet except over the unleased portion, the lessee is entitled to a right of way over such unleased portion; but, as was pointed out in "Peacock v. Hodges" (Buch. 1876, p. 69), "the right of road by necessity does not give a right to the enjoyment of a greater servitude than the absolute necessity of the case requires." So strictly was this principle applied in Holland, in the case of a sale, that according to Van Leeuwen (Comm. 2, 21, 12), "if the land had been so situated that there was an outlet by land in front and by water behind, then the land sold must be satisfied with the outlet by water." The rule applicable to an ordinary lease would also be applicable to a mining lease. The lessee has, as incident to his mining rights, the right of doing upon the unleased portion whatever is necessary for the enjoyment of such mining rights, but he can do no more. He may even fix such machinery as may be required for drawing the soil from the mine, but if the duty of allotting sites for such machinery belongs to some public body, like a Mining Board, then, according to a recent decision of this Court, he is held strictly to his contract, and would be guilty of trespass if he erected buildings and machinery without the consent either of the owner or of the Mining Board. Under the Roman law the owner of a dominant tenement had the right to do what was requisite for the enjoyment of his servitude, but this right was subject to the condition that he imposed no greater additional burthen upon the servient tenement than was absolutely necessary. If, for instance, he had a right to lead water over the servient tenement by means of pipes, he could not substitute a conduit of stones (Dig. 39, 3, 17, sec. 1), and he was bound not only to exercise ordinary skill and care, but also to repair, as far as he could, whatever damage he may have done to the servient tenement (Dig. 8, 2, 18). In the present case, it has been contended, on behalf of the defendant, that it is necessary for the due enjoyment of his mining rights that he should be allowed to break

down portion of the reef on the plaintiff's land. The argument is—and this is the most forcible way of stating it—that it would be a mockery to say that he has the right to remove the support if he has not the auxiliary right to do a necessary act on the plaintiff's land as a preliminary to such removal. The answer is two-fold. In the first place, the defendant has not stipulated, as he might have done, for a right to break down the reef as well as to remove soil from the claims. In the next place, it is clear that, by means of underground mining, the soil can be removed from the claims without first removing part of the reef. The mode of mining may be more expensive than open workings, but it is admitted to be quite practicable. It is said, however, that above, and not underground mining was contemplated by the parties. This may be an argument, although not a conclusive one, in favour of the defendant's right to remove lateral support from the reef, so long as he remains within his own limits, but it affords no excuse for trespassing beyond those limits. Such a trespass, without the consent of the owners, or of some independent public body, was as little contemplated as underground mining. I repeat that, in the form in which the appeal comes before us, we must decide the case without reference to any regulations which may possibly modify the rights of the parties. In the absence of such regulations, or of any mining customs, or of any resolution of the Mining Board, I am of opinion that no right arising out of necessity exists to remove any portion of the plaintiffs' land, so long at all events as the defendant can by a different but practicable system of mining dispense with the necessity of such removal. The argument as to the reef being a nuisance was not seriously pressed. If it was a nuisance it was not one which required abatement without delay, and the proper course would have been to apply for an interdict against its continuance, or to bring an action for its abatement; but it is not pretended that such an application or action could have been successful. I regret, therefore, that I cannot agree with the conclusions of the Court below upon this part of the case. If the removal of the reef was a trespass it would follow that the deposit of the removed reef upon floors let for the purpose of depositing soil from the claims was not strictly authorised by the terms of the articles of agreement. The damage done was not great, and seeing that the plaintiffs did not object to the removal of the reef till a considerable part of the work had been done, and that their main object is to establish their legal rights, we are of opinion that a judgment for £5 damages and costs would have been sufficient. As to the question whether diamondiferous soil was removed from the plaintiffs' land, the Court below found that the 17,000 loads were really removed from the defendant's own claims, and there is evidence to support the finding. The appeal will therefore be allowed, and judgment entered for the plaintiffs for £5 damages, with costs in this Court and in the Court below.

Mr. Justice Smith: That one should so use his own property as not to interfere with the rights of another is a maxim adopted in the jurisprudence of every civilised nation. One who has rights connected with land adjoining that of another cannot in the exercise of those rights do anything that will cause his neighbour's soil to (subside or) fall down. In other words, the owner of land has the right of lateral support from his neighbour's land. This right may of course be abandoned by agreement. Where the owner of land grants to another the right to dig and search for minerals on a portion of his land the grantee must exercise his right so as net to injure the adjoining land of the grantor, provided there is no clause in the agreement which permits him to work in such a manner as may necessarily cause injury, or provided the only way in which the work could be done was such that injury would probably arise. In this case there is no such clause in the lease, and there is no evidence to show that when the leases were granted the necessary or probable consequence of working in a proper manner under the rights given would cause reef to fall in. There was no obligation on the plaintiffs to remove the reef in order to prevent its falling in; the obligation was on the defendant, if he chose to work his claim by open mining, to leave such a lateral support as would prevent the plaintiffs' ground falling into his claims. The defendant therefore committed a trespass in going upon the plaintiffs' land and removing the soil, and is liable in damages for the injury caused. I concur in the estimate of that damage stated in the judgment of the Chief Justice. Even if there had been an obligation upon the plaintiffs to remove the soil so that it should not fall into the defendant's claims, in my opinion the defendant would bave had no right to go upon the plaintiffs' land and remove it. By the law of England, as laid down in the older cases, if the owner or occupier of land creates a nuisance upon his land, his neighbour may enter upon his land and abate it, but the tendency of the more recent law is to modify this rule. If the nuisance has been created by another person, the neighbour cannot justify his trespass unless he has previously given notice to the owner or occupier. Our law does not allow a man to take the law into his own hands, except in cases of necessity. If one creates a nuisance dangerous to health unless instantly removed, one likely to be injured would be justified in abating it, but in ordinary cases one is not justified, in my opinion, in entering upon another's and even to abate a nuisance.

Mr. Justice Buchanan: To the plaintiffs' claim for damages for trespass on their ground adjoining

the Du Toit's Pan diamond mine, the defendants plead justification, alleging that in the course of working the claims in the mine leased to the defendant company by plaintiffs, certain neighbouring and adjoining ground, being the main reef of the said mine, became threatening and dangerous to the workings of the said company, and that the defendants thereupon of necessity removed the said ground to ensure the safe working of the said claims as by law they were entitled to do. The plaintiffs are the owners of the mine as well as of the surrounding property, and by the lease of the claims within the mine they gave the defendant company as lessees full and free liberty, licence and authority, to dig and search for diamonds and precious stones in such claims, subject to and in accordance with the rules and regulations now in existence or which hereafter may be made by the Government for the management of mines of this class. According to the judgment in the Court below the plaintiffs contended generally that claimholders, in the course of their work, have no right to deprive the owners of the soil of their common law right to lateral support. Now, whether or not the doctrine of lateral support is known to our law has never, as far as I can discover, been definitely settled by any decision of the Supreme Court; though it has been referred to in several cases, and was assumed in the case of "McFarland v. De Beer's Mining Board" (2 H.C. Rep., 398). As might be expected, the Dutch authorities are not explicit on the point. Indeed, in the Court below, it was argued that the only right to lateral support known in Roman-Dutch Law was the servitude of supporting a weight. Still, after considering the arguments so fully set forth by the Chief Justice, the *dicta* in the several reported judgments, and the principles upon which the doctrine is founded, I think we ought now to hold that it is part of our law. The maxim *sic utere tuo ut alienum non lædas* may be said to contain the germ of the principle of lateral support. Assuming, then, the existence of the right of lateral support in ordinary cases, we have the decision of the late Court of Appeal in "Murtha v. Von Beek" (1, Ap. C. Rep., 121), affirming that as between claimholders themselves in this very mine, the rule cannot be applied. This being so, that decision turned simply on the question whether or not there had been negligence on the part of the claimholder. The Chief Justice said: "The counsel for the appellant admitted that there is an implied obligation upon every claimholder, who holds himself out as a digger, to use reasonable diligence in working down his claims, and not to lag behind unnecessarily to the injury and detriment of his neighbours. I do not see how the principle of lateral support embodied in the English law can be made to apply to cases of this kind. Even if it be the law of the Colony that a man is entitled to lateral support, I do not see how it can apply to cases where a person, having a claim surrounded by neighbours who were not as diligent as he was, might have to leave extensive lateral support to each of those neighbours, leaving very little ground for himself to work in." All the judges concurred in this finding, Barry (Judge President) expressly adding: "I cannot assent to the proposition that lateral support is a duty in the mine in question." There is, however, a material difference between the position of claimholders among themselves, persons who have leased claims in a mine for the express purpose of working them down, and the owners of the soil who, as the plaintiffs have always done, have persistently refused to take upon themselves any responsibilities beyond that attaching to them in their capacity as lessors. That was indicated in the cross appeals in the cases brought by the Griqualand West Diamond Mining Company against the present plaintiffs (1 Buch. Ap. Cases, 239). It may be deduced from those cases that when claims which have been leased have been abandoned and have reverted to the owners of the soil, that such owner is not bound, as a claimholder would have been, to work down such abandoned claim or to remove debris falling therefrom. That position was recognised by the subsequent legislation contained in Act No. 12, 1889, which puts the owner of the soil to his election to undertake the liabilities of an ordinary claimholder, or to allow the Mining Board to step in, but unless the owner of the soil consented no such burden was cast upon him. If, then, no liability attaches to the lessor in respect of abandoned claims in the mine, it is an *a fortiori* proposition that none attaches to him as owner of land outside the mine which has never been leased at all. The fact that there was no obligation attaching to the owner in respect of land outside the mine would give force to the contention that he would be entitled to his common law right of lateral support to keep that land intact. But, on the other hand, we find that though there is no obligation on the owner even in respect of abandoned claims, yet he has no right of lateral support in respect of such claims. The same rule might not illogically follow in respect of land adjoining claims which he had leased, as obtained in regard to abandoned and therefore unleased claims. I find some difficulty in this case caused by the absence of evidence on points which seem to me material to a correct decision of this important question. We do not know what rules and regulations, referred to in the lease, are in existence. Though there is evidence that the defendants acted in a thoroughly proper miner-like way, and properly carried out their operations, no custom has been pleaded. The learned judge in the Court below states that it is in evidence that from the opening of the

mine in 1871 up to the present time the universal and approved method of mining in this mine has been by the method of open working, and he says that it is also clear that this method was in contemplation of the parties at the time when the present lease of the claims was entered into. Though the record is not very clear in supporting this finding, it is no doubt supported by the fact that annexed to the lease of the claims themselves there is an agreement allotting to each claimholder a depositing-floor upon which to place the soil removed from the claims. It is also in evidence that although during the past working nearly all the margin of the mine had fallen into the mine, no objection was ever before raised by the plaintiffs. From McFarland's case, already referred to among others, it appears that the Mining Boards at certain of the Griqualand West mines have power to tax the claimholders to raise funds for the express purpose of removing the reef; and further, in arguing this case, counsel on both sides have not dealt with this question, the Attorney-General, for the plaintiffs, asserting that the question of lateral support had nothing to do with the issue; and Sir Thomas Upington, for the defendants, remarking that the question of the right of lateral support need not be argued as between the company and its lessees. Under these circumstances I am not now prepared to decide that the plaintiffs are entitled to lateral support for the reef round the mine, from claims in the mine leased by them for the express purpose of being worked down and the soil therefrom removed. But I think that the Attorney-General correctly contended that there was a missing link in the chain of the argument in the lucid judgment of Mr. Justice Solomon, viz., that whether or not there was a right to lateral support, as there was no obligation on the owner of the soil to do anything, but that he was entitled to lease his ground round the mine in a state of nature, and as he had not granted to the lessee of the claims any right to work elsewhere than in the claims leased, there was a trespass committed when such lessee went outside his claims, and worked down the reef situated beyond them. The learned judge says it would be absurd to hold that the defendant in working down his claims might, by removing the lateral support from the margin of the mine, cause the ground to fall into the mine, but that he had no right to go upon the plaintiff company's land in order to remove the danger. But this absurdity is no answer, if such is the position contended for by the parties. This difficulty was evidently felt by the defendants, for they attempted to justify their conduct on the ground of necessity. But here again the defendants seems to me to have failed. To support such a plea there must be very much stronger evidence than has been led in the case, and we cannot overlook the fact that in other mines this alleged necessity has been overcome by adopting a different manner of working. As the case stands, it seems to me that the appeal must be allowed, and the judgment entered in the Court below for the defendants set aside. No substantial injury has been sustained by the plaintiffs, and I would prefer, in the absence of any proof of custom, or of any evidence of any rule or regulation such as that contemplated by the agreement between the parties, and without full argument of the question of the right or otherwise to lateral support, that the judgment should be altered to one of absolution from the instance. In strictness, however, the onus was on the defendants to justify their conduct, and, having failed to do so, the plaintiffs are entitled to a judgment, which would carry costs, both in the Court below and on appeal.

SUPREME COURT.

TUESDAY, JANUARY 13.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

MARAIS V. VAN RENSBURG.

Will mutual—Codicils made subsequently to testator's death—Exception.

Where under a mutual will a daughter had acquired a "vested interest" her executors are the proper persons to sue and not her children.

Mr. Searle, with him Mr. Graham, for plaintiff.

Mr. Schreiner, with him Mr. Molteno, for the defendant.

This was an action commenced in the Circuit Court of Mossel Bay, last October, to recover a share of an inheritance alleged to be due under the will of the late Mr. J. van Rensburg and his wife. From the mutual will made in 1876 the survivor was appointed executor, and was to have possession of the estate during his or her lifetime. After the death of the survivor the joint estate was to go to their children, certain legacies were given, and in the event of the children dying before "us, the testators," their lawful descendants were instituted heirs. The plaintiff's wife was a child of S. M. van Rensburg, who married one Wilkinson, S. M. van Rensburg being a daughter of the testaters. The testator died in 1881, S. M. van

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Rensburg (Mrs. Wilkinson) died in 1887, and in May, 1887, subsequently to the death of S. M. van Rensburg, the testatrix died. Certain codicils had been made by Mrs. Van Rensburg, the testatrix, subsequently to testater's death, and it was alleged that she having adiated these codicils were invalid as interfering with the provisions of the mutual will. The Court, however, decided the case on an exception taken to the summons. The exception was that, from the above facts, Mrs. Wilkinson had taken a vested right under the will, and that her executors were the proper persons to sue, and not her children. The Court held that the words "before us, her testators," meant both testators, and Mrs. Wilkinson, the moment she survived her father, though she predeceased her mother, took a vested interest, and that therefore her executors would have been the proper persons to have brought this action. In the case of her insolvency her trustees would have been entitled to any amount due to her under the will.

MOLLER V. ASKEW.

Insolvency—Sequestration of estate—Provisional order set aside on want of proof of insolvency—Act 38 of 1884.

This was an application to have the provisional order of sequestration against the respondent's estate made final. Mr. Schreiner appeared for the applicant; Sir Thomas Upington, Q.C., for the respondent. The provisional order was granted on 7th January, and made returnable on the 12th, by Mr. Justice Smith. The respondent was indebted on a mortgage bond on which an instalment of £200 became due on 31st December; the defendant appeared unable to pay. From the affidavits it appeared that H. P. Moller, on behalf of his son, wrote asking for the payment of the instalment. In reply a letter was written by Askew, stating his inability to pay. This letter was annexed to the original petition. Askew, on Moller's calling on him, showed a statement in which he had a considerable credit balance. Moller said he would have to write to his son, and the first notice Askew had of any proceedings was by an attachment by the Master's messenger. In consequence he was not able to get at his books, but stated that, in addition to the statement already shown, he had property worth £400 and £120, besides the business premises worth £1,200. Askew further stated he could easily have raised a loan of £900.—The Chief Justice to Mr. Schreiner: The Court has again and again held that under the Act of 1884 there must be very clear proof of insolvency.—Mr. Justice Smith: The only reason why I granted the petition was on account of the letter annexed. If the statement had been annexed as it should have been I should certainly not have granted the order.—The Chief Justice: The proper course would have been to have sued, and on a return of *nulla bona* the order would have been made. After hearing Mr. Schreiner, and without calling upon Sir Thomas Upington, the Court set aside the provisional order with costs, the Chief Justice stating that the petitioner was bound to prove the insolvency, and the fact that the respondent was unable to pay. In the present case the petitioner made a statement which induced the learned judge to grant the order, and withheld a statement which showed a credit balance due. On this no proper conclusion could be drawn, but the additional evidence clearly shows there is no insolvency. The application should never have been made, and must now be set aside with costs against the applicant.

SUPREME COURT

(IN CHAMBERS).

TUESDAY, JANUARY 20.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

ADMISSION.

On the motion of Mr. Molteno, Mr. William Moltene Bisset was admitted to practise as a conveyancer.

IN RE ESTATE OF LATE W. WESLEY MARTIN.

Mortgage of landed property in estate of deceased person to pay off bond and other debts.

Mr. Castens presented an application by the executors of the above estate for leave to mortgage the landed property of the estate in order to raise a loan to pay off an existing bond for £1,400 and a debt of £600 due to the estate of the late John F. Martin, and for an order that the costs of the application might be paid out of the estate.

The Court granted the order.

IN RE THE ESTATE OF THOMAS HALL, DECEASED.

Mortgage of landed property in estate of deceased person to meet calls on shares in bank in liquidation.

Mr. Watermeyer moved, on behalf of the execu-

tors of the above estate, for leave to mortgage certain property situated in Hof-street to raise necessary funds to pay calls in respect of Union Bank shares.

Order granted.

IN RE ANNA SOPHIA HAMMAN, AN ALLEGED LUNATIC.

Mr. Juta moved for the appointment of a *curator ad litem*, and for leave to give evidence on affidavit.

The Court granted the order, and appointed the Resident Magistrate of Victoria West *curator ad litem*, and allowed the evidence of Dr. Drew to be given on affidavit.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Searle, on behalf of the liquidators of the above bank, moved for the confirmation of certain compromises effected by the liquidators.

The Court granted the order, subject to the list of compromises being amended and fuller details given.

THE PAARL BANK, IN LIQUIDATION.

Mr. Schreiner moved, on behalf of certain shareholders and customers, for leave to inspect the books of the bank; to make extracts from the same; and to be assisted by an accountant.

Mr. Searle, for the official liquidators, consented, and the order was granted.

THE PAARL BANK, IN LIQUIDATION.

Liquidators' First Report.

Mr. Schreiner presented the first report of the liquidators of the Paarl Bank, as follows:

The official liquidators were appointed by the Honourable the Supreme Court on the 20th December, 1890. An examination into the affairs of the institution has been made by them as well as the limited time since their appointment and the means of information at their disposal would allow. The result is as follows:

The liabilities of the bank, according to the books on the 6th December last, were, exclusive of shareholders' capital and reserve funds, as follows:

Deposits, fixed	£143,256 0 11	
Deposits, floating	44,022 16 8	
		£187,278 17 2
Notes outstanding		4,170 0 0
Unpaid dividends		850 18 0
Loans		26,750 0 0
		£219,049 10 2

The assets of the bank the liquidators estimate as under:

Coin in the bank's coffers			£993 7 3
Balance in and notes of other banks	£1,127 12 1		
Estimated present value			992 12 1
Bills and notes under discount	132,212 15 0		
Bills and notes due	56,554 9 1		
	£188,767 4 1		
Estimated present value			67,451 18 6
Advances against securities	7,620 0 0		
Estimated present value			2,418 0 0
Bank premises	3,313 0 0		
Estimated present value			2,500 0 0
Landed property	2,871 12 0		
Estimated present value			1,575 0 0
Mortgage bonds	33,394 4 0		
Estimated present value			24,600 0 0
Shares	1,914 0 0		
Furniture	334 17 0		
Estimated present value			100 0 0
Loans	9,300 0 0		
Estimated present value			9,300 0 0
			£109,980 12 10

This result is ascertained after making allowance for such bad and doubtful debts as at present can be estimated, and shows a deficiency of £109,068 17s. 4d. Owing to the position of the debtors, and the nature of their assets, it is hardly necessary to remark that great care and caution will have to be exercised in dealing with these assets, the recovery of which must extend over many years, unless an immediate realisation be decided on, which mode the liquidators are of opinion is dangerous, and will probably lead to very serious loss. It is a matter for regret that the directors did not several years ago make a valuation or estimate of their assets; the results would have convinced them of the very unsatisfactory state of affairs.

A very large proportion of the bills at present under discount is in connection with gold scrip transactions, the value of the scrip attached to these bills being at present merely nominal, clearly showing that the directors, taking into consideration the small capital of the bank, viz., £13,810, have been overtrading to an unjustifiable extent.

From the 30th June, 1890, to the date of stoppage, the 6th December last,		
The liabilities of some of the directors increased by	£11,481	
That of the cashier and accountant by	7,591	
Joint liability of cashier, directors and others	8,371	
		22,443
At the closing of the bank's doors:		
The joint liabilities of some of the directors amount to ...	£33,804	
Of the cashier	9,657	
Of the cashier jointly with others	9,044	
Of the accountant	7,942	
		60,447

—equal to about one-third of the total amount of the bills under discount, and about five times the amount of the bank's capital.

It is remarkable that in the published half-yearly statements of the bank, notably that of the 30th June last, the overdue bills figure at £4,889 19s. 11d.; the overdrawn accounts £1,979 14s. 8d., whereas at the date of the stoppage the overdue bills appear at £56,554 9s. 1d., and the overdrawn accounts £5,799 14s. 3d.

This is explained by the fact that at or about the period of the publication of the half-yearly statements required by law, nearly all overdue bills were renewed, in some instances the discount being added to the renewals; the overdrafts were extinguished by the acceptance of promissory notes from the debtors irrespective of their financial position. This practice appears to have been in vogue for some time past. Had a proper system of audit inspection been followed, the liquidators consider that the present deplorable state of affairs could have been averted.

The liquidators, though they have not had full time to go thoroughly into the conduct of affairs, have nevertheless seen sufficient to satisfy them that gross and serious errors of judgment were displayed in the management of the bank's affairs, and that the directors have failed to make sufficient provision for the losses likely to arise on the very large amount of bills under discount. Although it ought to have been obvious heavy losses would occur, no proper provision was made for the same, nor was any reference made thereto in the past annual report laid before the shareholders. The directors, instead of confining themselves to sound legitimate banking, made considerable advances on securities having only speculative values. Another injudicious act on the part of the directors was to borrow a sum of £26,750 on the best securities of the bank, with the full knowledge of the position of affairs.

There are at present 2,762 registered shares, of which 370 are held by insolvent shareholders, 588 are under pledge to the bank by some of the directors and the cashier, 70 are held by the bank itself, 555 are pledged by other shareholders.

Great depression naturally exists in consequence of the stoppage of the bank, the shareholders being mostly all proprietors of farms and landed properties in the village and district of the Paarl. Some of the properties are already mortgaged to a certain extent of their value, leaving little margin available to meet the heavy call which will be necessary to meet the estimated deficiency of £109,068 16s. 4d., besides which the continuous pressure of sales which will have to be resorted to during the liquidation must seriously affect the value of properties, and further tend to depreciate the value of the other securities. The liquidators have therefore very great difficulty in arriving at an estimate on which they can confidently rely of the probable result of the liquidation, which they fear will prove disastrous to nearly every shareholder, as the prospects of a more favourable realisation than that indicated are very remote.

To add to the difficulties, several shareholders are already insolvent; whilst others, independent of their share liability, have heavy obligations to the bank, which it is anticipated they will be unable to satisfy, thus leaving the burden of the bank's liabilities to be borne by a reduced list of contributories, some of which indubitably are not in a position to meet them fully.

Under these circumstances it becomes difficult to decide what call to recommend to be made upon shareholders towards payment of the claims of creditors. After much deliberation the liquidators came to the conclusion to suggest that the call should be fixed at not less than £250 per share, payable at once.

It is with much concern that the liquidators must, however, record their fear that very few of the shareholders will be able to meet this call in full; and it is estimated that, after every shareholder on the list of contributories is excussed, the result will only yield about £53,000, leaving an estimated deficiency of about £57,000.

For the purpose of settling the list of contributories, as required by the 18th section of the Act, an extract from the share registry of the present shareholders now registered is attached to this report (marked A). We are advised by counsel to the liquidators that to meet the deficiency referred to it will be necessary to recur to former shareholders, and accordingly beg to annex hereto a list of those persons who were the immediate transferors of the existing contributories; and we also beg to ask leave of the Court, in the event of further deficiency, to present an additional list of former shareholders.

The liquidators have already had several applications made to them for compromising claims and for extension of time, which in most cases it would

be for the ultimate advantage of shareholders should be entertained. Similar questions are likely to occur more frequently when the call is made upon shareholders. Each case will be properly inquired into, and from time to time reported to the Court for direction thereon, after these proposed compromises have been advertised for inspection of contributories for fourteen days.

Under the 27th section of the Act, it is requisite for the Court to fix the time within which creditors are required to prove their claims, and to meet the convenience of all, the liquidators would suggest that claims be received till the 28th February, 1891.

The liquidators have in certain cases, in the interest of the liquidation, deemed it prudent to accept part renewals of promissory notes, which the makers and endorsers could not meet in full; and will continue this course when necessary. They feel assured that by adopting this practice it will tend to protect the interests of all concerned. The liquidators have in some instances allowed depositors to set off their credit balances against their indebtedness to the bank, and they also desire authority to set off their deposits against their share liability. All moneys received have hitherto been kept in the bank's safe; and the liquidators now desire the Court's authority to deposit same in the Standard Bank.

The liquidators have now to solicit the order of this Honourable Court on the following points, viz.:

First: To settle the list of contributories under the 18th section of the Act, for which purpose the annexures, referred to in this report, are submitted.

Second: To fix the time and mode the creditors shall prove their claims under the 27th section.

Third: To assess the amount of the call under the 22nd section.

Fourth: To direct as to the extent this Honourable Court will grant the liquidators the power to compromise under the 44th section.

Fifth: To authorise the liquidators to pay dividends without first filing accounts.

Sixth: To authorise the liquidators employing Mr. C. C. de Villiers, of Cape Town, as their attorney, they having already been compelled to avail themselves of his services.

Seventh: Under the 18th section, to fix the remuneration to be paid to the liquidators.

The Court granted the usual order as to the report lying open for inspection for fourteen days, and for publication of the notice.

TAYLOR AND SYMONDS V. SCHUNKE.

Costs—Security for—8th and 14th Rules of Court.

Witham *vs.* Venables (1 Menzies, 291) as explained by Lumsden *vs.* The Kaffrarian Bank (3 Juta, 366) approved A non-resident plaintiff who owns immovable property in the Colony the value of which after deduction of any mortgage debts due thereon would suffice to pay the probable costs of the action is relieved from giving security for such costs.

Where, however, he is defendant in reconvention he is obliged to give security to perform the judgment of the Court (*cautio judicatum solvi*).

Mr. Schreiner moved, on behalf of the defendant, that the plaintiffs should be obliged to give security for the costs of a pending action, in which defendant set up a claim in reconvention. Mr. Searle, on the authority of Lumsden v. The Kaffrarian Bank, 3 Juta 366, Voet. (2, 8, 1) and (2, 8, 4,) and Van Leeuwen, Roman-Dutch Law. Book, 5, ch. 17, sec. 9, contended that the plaintiffs were not obliged to give security.

Mr. Schreiner argued that the case of Lumsden v. The Kaffrarian Bank did not apply, and quoted Voet (2, 8, 10) in support of his contention.

The Court, having heard the arguments of counsel, reserved judgment.

Postea—(February 2nd).—The Court delivered the following judgment:

The Chief Justice said: Securities given by litigants under the Dutch system of procedure were of two kinds, viz., the *cautio de sistendo* and the *cautio judicatum solvi*. By the former he undertook to stand to and abide the judgment of the Court, by the latter he undertook to perform it. (See Voet, 2, 5, *passim*.) Under the 8th Rule of Court an unsecured creditor for £15 or upwards can obtain from the Registrar of the Supreme Court a writ for the attachment of a debtor who is about to remove, or is making preparations to remove, from the Colony, and such a writ stands in lieu of the ordinary summons. If the defendant gives no security he is kept under arrest until judgment, but, when once judgment has been pronounced, he is discharged from arrest, and, if he is to be kept any longer in prison, it can only be under a separate process for civil imprisonment in execution of the judgment. But a defendant may be released before judgment upon giving security under the 14th Rule of Court that he will "stand to, abide, and perform the judgment of the Court, or render himself to the prison of the said Court in execution thereof." It has been more than once decided that these rules were not intended to deprive the Court itself of the power to order the arrest of a defendant, or require security from him in cases, although not falling within the rules, where the law authorises such arrest or security. It is

obvious that these rules apply only to the case of resident defendants. In order to confirm jurisdiction in an action against a person not domiciled in this colony an application must be made to the Court for the attachment of his person or property. Such an application, as pointed out in "Einwald v. German West African Company" (5 Juta, 86), would not be granted, unless some ground of jurisdiction existed, such as in the case of a tort, that it was committed in this colony, or in the case of a contract, that it was to be performed in this colony, or that the subject-matter was situated within this colony. "The object of the attachment," says Perkins (*De Jure Sistendi*, 45, 11), "is not only to secure the debt, but also to facilitate proceedings against the debtor." The order for attachment, therefore, could only be discharged upon sufficient security being given. The ownership of immovable property did not, under the Dutch practice, relieve the defendant from giving such security, unless the property itself was under attachment, in which case the attachment protected the plaintiff. (See *Groenen ad Dig.*, 2, 8, 15.) The security thus required was *judicatum solvi*, and not *de sistendo*, which was practically obsolete. (*Groenen ad Inst.*, 4, 11, 2, and 4.) In the present case there is no subsisting attachment upon the respondents' land, the order previously given having been discharged on the ground that a material fact was not disclosed to the Court by the plaintiff when he obtained the order. That fact was that the respondents had themselves commenced an action in this Court against the applicant. This was a most material circumstance, for, according to the rule *reconventio forum competens efficit*, the respondents could not, after instituting their action, question the jurisdiction of this Court to entertain the applicants' claim in reconvention, or, by relinquishing their action, prevent the Court from deciding the claim in reconvention. (See Voet, 5, 1, 78.) The questions which must now be determined are: (1st) whether, as plaintiffs, the respondents must be ordered to give security for costs; and (2nd) whether, as defendants, they should be ordered to give security to perform the judgment of the Court upon the applicant's claim in reconvention; and (3rd) if security is to be given, for what amount it should be. The first question has been practically decided by the Court in the case of "Witham v. Venables" (1 Menz., 291), as explained by the subsequent case of "Lumsden v. The Kaffrarian Bank (3 Juta, 366). It is too late to question the correctness of the former case as so explained, seeing that it has been acted upon in several subsequent cases. We must, therefore, take it to be the proper practice that a non-resident plaintiff, who owns immovable property in this colony, the value of which, after deduction of any mortgage debts due thereon, would suffice to pay the probable costs of the action, is relieved from giving security for such costs. The respondents own immovable property of great value which is mortgaged for a comparatively small sum, and ought not therefore to be called upon to give such security. The second question has never yet been determined in this Court. If the respondents had not instituted any action against the applicant there would have been no doubt, in view of the authorities I have cited, as to their liability to give security as defendants. The fact that they have forestalled the applicant in this suit ought not, in my opinion, to relieve them from that liability. According to Voet (2, 8, 1) a non-resident plaintiff can be called upon to give security not only for the defendant's costs, but also for his claim in reconvention. According to Van Leeuwen (R.D. Law, 5, 17, 9), the defendant may request security for costs, and for that which he may claim in reconvention, and Chief Justice Kotzé, in a note to his translation of the passage, refers to a Transvaal case which was decided in accordance with the text. The amount for which security was acquired under the Dutch practice was, as a general principle, that which the plaintiff claimed. Under that practice, however, differing in that respect from ours, a plaintiff incurred certain penalties if he claimed an amount far in excess of that which was ultimately awarded to him. It is a question whether it would not be wise to recur to the former practice, seeing what excessive claims are sometimes presented to the Court for adjudication; but until our practice is altered the Court must retain some control over the amount of security to be required from non-resident defendants In the present case we are of opinion that the security must be for £2 000. Failing such security being given to the satisfaction of the Master of the Supreme Court within twenty-four hours, the Registrar will be authorised to issue an interdict restraining the respondents from alienating the property and bond previously attached pending the decision of the action. The costs of this application must be costs in the cause.

Mr. Justice Buchanan said: The plaintiffs, who are not domiciled in this colony, sue the defendant, a resident. Before entering appearance defendant calls upon plaintiffs to give security for the costs of the action, and also for the sum of £47,000, which, he states, he intends to claim in reconvention as damages for breach of contract. The plaintiffs deny their liability to give any security at all, as they are registered owners of landed property purchased for £26,000, of which plaintiff Symonds's half-share is unmortgaged, but Taylor's half-share therein is mortgaged to his co-owner for £8,000. A previous application by defendant to attach plaintiffs' property in order to found jurisdiction in an action which he proposed

bringing, and in which defendant intended to make the claim he now proposes to set up in reconvention, was refused, as the defendant had concealed certain material facts from the Court as to the action taken by plaintiffs. This matter of security to be given by litigants is one purely of judicial practice. This practice has been a progressive one, the true principle underlying it appearing to be that justice shall not be denied by unreasonable obstacles being placed in the way of persons seeking redress; while at the same time citizens are to be secured from being unduly harassed by unfounded claims. Thus formerly, under the civil law, the provisions of the law that when a person duly cited did not appear he was liable to a fine led to a defendant giving security, in the first place for his appearance in court, and afterwards for the subject-matter of the suit, and in turn the plaintiff was bound to give a guarantee for the security of the defendant. (See Voet bk. 2, *lits* 5 *et seq.*, and authorities cited by him). These requirements were from time to time modified, and Voet states (2, 8, 1) that in his time security on the part of the plaintiff had ceased to be required unless he was a *peregrinus* having a foreign domicile, or was otherwise *suspectus*, in which cases he would be liable to be required to give security for the full amount of costs, and to enter on the case in reconvention (*reconventione suscipienda*). The leading case in our Court as to when security for costs is exigible from a plaintiff is reported as "Witham v. Venables," 1 Menzies, 291, decided shortly after the establishment of the Supreme Court in 1828. The report states that the Court, after full argument and a deliberate consideration of all the authorities, held that no person who is either *civis municeps* or *incola* of this colony can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and on the other hand that, every person who is neither *civis municeps* nor *incola* may, as plaintiff, be called on to give security for costs, unless he prove that he is possessed of immovable property situated within this colony. The report states that the Court found that the plaintiff in that case was an *incola*, and it consequently follows that the second part of the opinion expressed in the report was merely an *obiter dictum*. It is, however, clear that the learned judge, from whose notes these reports were collated, intended to record the opinion of the Court on both points. I have endeavoured, though without much success, to discover the particulars of the case. The plaintiff appears to have been an attorney of the Court, but from other proceedings it would seem likely that he was no more than nominal plaintiff, the real plaintiff being in England at the time. This seems to explain why the Court expressly laid down under these circumstances that the plaintiff was to be considered an *incola*, and also to suggest why an opinion was given as to the liability of a plaintiff who had no local domicile. The practice of the Court for upwards of sixty years, founded on this case, has with us established the right of a defendant to claim security for costs from a foreign plaintiff. It may be noticed that the dictum in "Witham v. Venables" goes to relieve such a plaintiff from giving security for costs if he be possessed of immovable property within the Colony. This dictum was qualified, or, at least, explained, in "Lumsden v. Kaffrarian Bank" (8 Juta, 366), as meaning that plaintiff's property must be of sufficient value. The Chief Justice, in giving judgment, then said that there were authorities in the civil law to the effect that a person possessed of immovable property was not bound to give security, but that it was quite clear that the rule of the civil law had been departed from in the Dutch law. A consideration of Voet and the other commentators, however, would show that a distinction is drawn between what is demandable from a foreign plaintiff and the security required from a foreign defendant, and this seems to explain the apparent difference. The Court did not go the length of overruling the dictum in "Witham v. Venables." As the object of the provision is to secure the defendant, the Court in Lumsden's case held that the defendant was not secured if the plaintiff's property was mortgaged for more than its full value. And on the same principle the Court only last August term, in the case of "Hulbert & Co. v. Caporn & Marriott," refused to order the plaintiff to find security. There the plaintiff was not an *incola*, and it was not suggested that he had any landed property in the Colony, but as defendants admitted their liability for part of the money sued for, which amount was sufficient to cover their costs, it was held that they were not entitled to any further security. What, then, the Court looks to is, that the defendant shall not be left unprotected when sued by a foreign plaintiff. And this position is not assailed by the fact that the authorities seem to recognise the right of a foreign plaintiff who is a pauper to sue without giving any security, or obtaining the leave of the Court, for such a plaintiff must first establish a *prima facie* case. The right seemed to have been recognised by this Court in 1871, in the case of "Greig & Co. v. Robertson's Curators," where defendants' application to compel a plaintiff who was not an *incola* to find security for costs was stayed on plaintiff undertaking to prosecute an application for leave to sue as a pauper. That case, however, does not seem ever to have got the length of a trial. Of course, if a plaintiff is absolved from giving security because he is possessed of immovable property, on any suggestion of fraud, or that he was disposing of such property, and so

defeating the security thereby guaranteed, the Court would not hesitate to interfere. But there is no such suggestion in this case, and I am of opinion therefore that so much of the application as refers to security for costs ought not to be granted. But there remains the further question as to security for any claim which defendant may set up by way of reconvention. It may be noticed that no reference is made to this point in "Witham v. Venables," probably because in that case no such claim was set up. The passage cited from Voet (2, 8, 1) is open to a construction different to that contended for by defendant; but I find that all the commentators to whom I have referred recognise defendant's right to such security. Van Leeuwen, in dealing with dilatory exceptiens, states that if the plaintiff be a stranger the defendant may request, in addition to costs, security "for that which the defendant may claim from the plaintiff by way of counter-claim." (Commentaries, bk. 5, ch. 17, sec. 9, Ketze's Translation, vol. 2, p. 457.) Van der Linden, in his "Judiciele Practycq" (2, 4, 4), lays down that defendant may claim security for the costs of the action, and for the performance of the claim in reconvention (*om te doene reconventie*). Merula is to the same effect, "Manier van Procederen" (4, 41, 1, 1), and the learned translator of "Van Leeuwen's Commentaries," in a note to the passage already referred to, cites a decision of the Supreme Court of the Transvaal to the same effect. I have not been able to discover any instance where any such order has been given by this Court. On the contrary, I find that in "Holycake v. Laing" and "Horton v. Laing," in 1833, applications for such security were made and dismissed; but it is probable this was on the merits, as no security at all was there directed, even for costs. But while a defendant is sufficiently protected from being unduly harassed by unfounded claims by compelling a foreign plaintiff to give full security for costs, or to be possessed of property available in case of his being unsuccessful, to compel such a plaintiff who follows his debtor to such debtor's domicile, and sues him in his own forum, to give security for any amount of damages which such debtor states he intends to claim by way of reconvention, would open the way to the denial of justice. It is true all the old authorities on practice already cited state that a foreign plaintiff unable to find security may be admitted to sue upon giving the *cautio juratoria*, viz., an oath that he would satisfy the judgment of the Court, but that would be a security upon which in these days very little value would probably be placed. The proper course, I think, would be to put the defendant in exactly the same position as he would have been in had he instituted an action for the damages claimed, instead of setting them up by way of reconvention. Before anyone could sue a foreigner, jurisdiction would have to be established, which may be done by arrest either of person or of property, and as such arrest can only be by permission of the Court, the Court can determine the nature and extent of the arrest. If, then, we treat the defendant's application for security of his claim in re-convention as if he were a domiciled plaintiff suing foreign defendants, in granting that application the Court is entitled to consider all the circumstances connected with the claim, and without in any way prejudging the case, to determine on the nature and extent of the security which should be given, so as on the one hand to protect the applicant, on the other to see that justice is not denied. It is, I think, when considering the position of a foreign defendant that the Dutch law authorities referred to in Lumsden's case lay down that even an owner of land is not exempted from liability to give security, though, of course, such security may be given either by finding sureties, or it may be by attaching property within the jurisdiction of the Court. Under the circumstances of this case I think it will be sufficient to order the defendants in re-convention to find security for the sum of £2,000, or to have his property attached as stated by the Chief Justice.

ATKINSON V. THE REGISTRAR OF DEEDS.

Deed of Transfer—Registration of ordered although a rule established in the Deeds Office had not been complied with.

Mr. Schreiner moved, on behalf of the applicant, that the respondent should be ordered to pass and register a certain deed of transfer passed by James Smith Cawood to Joshua Samuel Hitchcock Atkinson, which deed was lodged in the Deeds Office on the 4th December last for registration, and was thereafter rejected on the 6th December.

The Attorney-General, who appeared for the respondent, read an affidavit, sworn to by the Registrar of Deeds, from which it appeared that a rule had been established in Deeds Office by which a deed of transfer would not be passed and registered unless the names of transferor's and transferee's father were inserted therein. The reason stated for adopting this rule was its great practical utility, and that by means of it many mistakes had been avoided, and errors which had existed for years had been detected. The Attorney-General contended that it was within the discretion of the Registrar to make such a rule, and that it was only one of many other rules of equal utility which were in force in the Deeds Office,

The Attorney-General also referred to the Placaats of the 19th June, 1714, and 22nd April, 1798.

Mr. Schreiner argued that the Registrar had no power under the statute to make such an arbitrary rule, and contended that if such a principle were admitted there was nothing to prevent the Registrar from establishing a rule that deeds of transfer should have attached to them the "photos" of the transferor's and transferee's father, mother and other relations.

The Court deferred making an order.

Postea (January 27th) the Court made the following order:

The Chief Justice recited the facts, and observed that by Ordinance No. 14 of 1844 the Registrar of Deeds was required to register all fit and proper transfer deeds and deeds of hypothecation. The Court was of opinion that the deed of transfer under consideration was such a fit and proper deed within the meaning of the statute, and consequently that the Registrar ought to be ordered to register the same. In cases in which the Registrar could show that confusion might ensue from not having the names of transferor's and transferee's father inserted in the deed of transfer the rule hitherto in force in the Deeds Office might be applied. In the present case, however, no such confusion could arise. The order would be granted as prayed with costs.

IN THE INSOLVENT ESTATE OF CHRISTOFFEL VILJOEN.

Mr. Schreiner prayed for an order confirming the election of Mr. Harry Gibson as sole trustee of the said estate, and to grant him full powers as provisional trustee to liquidate the estate.

Mr. Searle, on behalf of the Uitenhage Board of Executors, opposed the motion, and asked that Mr. Henry Nutall Chase should be appointed co-trustee with Mr. Gibson.

The Court ordered a fresh election; Gibson to have his costs if re-elected.

SUPREME COURT.

TUESDAY, JANUARY 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

ADMISSIONS.

On the motion of Mr. Molteno, Mr. Alfred Dyasson was admitted as an attorney and notary. The oaths to be taken in Port Elizabeth.

On the motion of Mr. Watermeyer, Mr. S. J. Mostern was admitted as a conveyancer.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. ESTATE OF VAN LIER.

Company—Bank in liquidation—Contributories—Application to vary list.

Mr. Searle moved in this matter for leave to vary the list of contributories to the above bank by placing thereon the names of the executors of the above-mentioned estate in lieu of the said Van Lier (deceased). It appeared from an affidavit read by Mr. Searle that the late Mr. Van Lier had appointed the South African Association executors of his will, and had directed that they should hold twelve shares in the Cape of Good Hope Bank for the benefit of the Cape Town Ladies' Benevolent Society, and that the dividends on the said shares were to be paid to that society. The liquidators were anxious to realise their legal position as against the heirs, executors, or the above-mentioned society, and prayed that the executors might be placed on the list of contributories.

The order was granted.

PETITION OF CAREL J. GROOVE, JUN.

Mr. Molteno moved on behalf of the petitioner that authority might be given to the Master to consent to the cancellation of a bond mortgaging a certain undivided share of the farm Drooge Onvast, in the district of Beaufort West, and to accept in place thereof a mortgage of a defined portion of such farm.

Authority granted to the Master as prayed for, on his satisfying himself that the security will remain sufficient.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Company—Bank in Liquidation—Compromises.

Mr. Searle, on behalf of the liquidators of the above-mentioned bank, asked for the sanction of the Court to a compromise proposed to be effected with one Frederick A. Searle, residing in Italy, in respect of thirty-five shares of which he is the registered holder.

It appeared from affidavit that Mr. F. A. Searle was at present living in Italy, that his capital had been invested in land in that country, settled upon his children, and that he had made an offer of £700 in full settlement of all claims against him by the Cape of Good Hope Bank. The liquidators now asked for the sanction of the Court to accept this offer, otherwise considerable expense would

be incurred in attempting to recover the full claim of £1,050.

Under the circumstances, the order was granted as prayed.

JOHANNES PAULUS MOSTERT V. THE REGISTRAR OF DEEDS.

Mortgage Bond — Cancellation — Cession — Non-compliance with Act 3 of 1864, Section 13. Rights of Mortgagor not affected.

Mr. Schreiner, on behalf of the applicant, moved for an order requiring the cancellation in the Debt Register of a certain mortgage bond passed by applicant in favour of one Lindenberg for £1,500, the same having been paid.

It appeared from affidavits read that Lindenberg, the mortgagee, had ceded the bond to the Bank of Africa, and that subsequently the bank had cancelled the cession.

Mr. Giddy, who appeared for the Registrar of Deeds, contended that the respondent was justified in refusing to cancel the deed, on the grounds that the cession to the bank and subsequent cancellation had not been stamped according to law, and in support of his contention referred to Act No. 3 of 1864, section 13.

Mr. Schreiner, in reply, pointed out that the applicant (the mortgager) had not been a party to either the cession or subsequent cancellation, and that he could not be made to suffer for the *laches* of the mortgagee or of the bank.

The Chief Justice, in granting the order as prayed for, remarked that he was clearly of opinion that section 13 of Act No. 3 of 1864 did not apply. The applicant had paid the amount of his bond, and was consequently entitled to have the same cancelled in the Debt Register, and he could not be affected by any claim which the Government might have against the mortgagee or others for not complying with the Stamp Acts. The order would be granted as prayed with costs.

SUPREME COURT.

MONDAY, FEBRUARY 2.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

BOARD OF EXECUTORS V. ROUX.

In this matter provisional sentence was granted and the property declared executable.

SAVINGS BANK V. DE WAAL AND ANOTHER.

Provisional sentence granted for £1,200 and interest from 30th June, 1889.

SOUTH AFRICAN ASSOCIATION V. ELLIOT.

Order discharged.

STANDARD BANK V. ROBERTSON AND BAIN.

This matter was ordered to stand over till Thursday next.

A. OHLSSON & CO. V. DAY.

Final order for sequestration granted.

SCOTT BROS. V. HIRST.

Provisional judgment for £28 3s.—Granted.

KAUFMANN AND PATERSON V. J. J. ATKINSON.

Provisional judgment for £8 19s. 9d.—Granted.

CLEGHORN & HARRIS V. W. J. HIRST.

Provisional judgment for £9 0s. 2d.—Granted.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Meier Gordan, Henerik Jacobus van Heden, James Jay, Eva Allright, Johannes Lambrechts van Niekerk, Tobias Elias Mall, Willem Schalk van der Merwe, Gabriel Francois Nel, Carolus Amsterdam, Edward Thomas Fleischer, Peter Jacobus Johannes Krummeck.

GANNON V. GANNON.

On the motion of Mr. Schreiner, the rule *nisi* in this matter was made absolute, dissolving the marriage subsisting between the parties, and giving the plaintiff the custody of the children and the costs of suit.

D'ARC V. BENSON AND ANOTHER.

In this matter Mr. Melteno moved for process in aid of a judgment of the High Court to enable execution to be levied on property of the defendants beyond the jurisdiction of the said Court.

Application granted as prayed for.

PETITION OF BAREND J. J. BURGER.

Mortgage Bond—Application for cancellation of refused where Mortgagor was executor of Mortgagee's estate.

Mr. Schreiner moved for an order authorising the cancellation in the Registry of Deeds of a certain mortgage bond passed by the petitioner in

favour of his deceased father, on the grounds that the mortgagee intended to release him from payment thereof, but failed to carry his intention into effect, in consequence of his illness and subsequent death.

It appeared from an affidavit sworn to by petitioner that the bond, which had originally been for £3,000, had at the time of the mortgagee's death been reduced by payments to £900. The bond itself could not be found after the mortgagee's death, he having presumably destroyed it, with the intention of freeing the mortgagor from further liability.

The Chief Justice, in delivering judgment, remarked that to grant the order as prayed for would be establishing a very dangerous precedent, as it might be an easy matter for an executor under similar circumstances to destroy proof of claims against himself. The order would be refused; but the petitioner might bring an action if he were desirous of having the bond cancelled. As there were minors to whom no guardian had been appointed under the will of the mortgagee; Mr. Juta would be appointed *curator ad litem* in the event of the petitioner bringing an action.

PETITION OF ANNA J. FOURIE.

Mr. Molteno applied in this matter for authority to draw a sum of money awarded to petitioner's husband out of the estate of his deceased father.

It appeared from affidavit that petitioner's husband had deserted her four years ago, and that during this period he had not contributed to her support, or that of the children of the marriage; that under the will of his father he was entitled to £49 6s. 8d., and the petitioner asked that this amount might be handed over to her.

A rule *nisi* was granted, calling upon respondent to show cause why half the amount to which he was entitled in his father's will should not be paid over to petitioner.

PETERS V. PETERS.

Mr. Jones moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

Rule made absolute.

PETITION OF HENRY ADSHADE.

Mr. Juta applied for the appointment of petitioner as curator of the person and property of his father, Charles Adshade, alleged to be a person of unsound mind and incapable of managing his affairs.

The Court appointed the Resident Magistrate of Swellendam *curator ad litem*, and ordered that his evidence and that of Dr. Shand should be taken on affidavit.

CAMPAAN V. CAMPAAN.

In this matter Mr. Jones moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action for divorce against her husband by reason of his adultery and desertion.

Rule made absolute, evidence to be taken on commission, the Resident Magistrate of Cala to act as commissioner.

SCALLAN'S EXECUTORS V. VOORTMAN.

Mr. Molteno applied for process in aid of a judgment of the Eastern Districts Court, to enable execution to be levied against property of the defendant beyond the jurisdiction of that Court.

Application granted.

IN RE THE BARQUE "HERA."

Ship—Arrest *ad fundandam jurisdictionem.*

Mr. Schreiner, on behalf of Messrs. Searight & Co., applied for a writ of arrest against the above-named ship.

It appeared from an affidavit of Messrs. Searight & Co. that the captain of the "Hera" was indebted to their firm in the sum of £55. A cheque for this amount had been tendered by the agents of the ship (Messrs. Poppe, Russouw & Co), but on presentation at the Standard Bank it had been referred to drawer.

The Court granted the arrest *ad fundandam jurisdictionem*, the writ to be discharged on security for £100 being given to the satisfaction of the Master.

STURROCK V. BIRT.

Libel—Application for particulars of allegations contained in libel refused, the Court being of opinion that the charges made were sufficiently "specific."

In this matter Mr. Juta moved for an order directing the defendant to furnish the plaintiff with particulars and details of the allegations contained in the libels set forth in the declaration filed in the suit between the parties.

Mr. Juta, in supporting the application, said that the plaintiff objected to the general character of the accusations made against her, notably those communicated by a certain "godly woman" and by a "good young man." She was anxious to know who those persons were, as well as under what circumstances, and at what times, she had committed the offences with which she was charged.

Counsel contended that she was entitled to this information, and in support of his contention referred to the cases of "Williams v. Shaw," 4

Buchanan, E.D.C. Reports, p. 105, and "Gourley v. Plimsoll," L.R. 8. C.P. 362.

Mr. Schreiner, on behalf of the defendant, opposed the motion and contended that the information asked for was purely of a "fishing" character.

The Court refused the application, being of opinion that the charges brought against the plaintiff were sufficiently "specific," and that the case of "Williams v. Shaw" did not apply. An order was also made for the issuing of a joint commission to take evidence in the case.

IN THE ESTATE OF THE LATE JOHN QUIN.

Attachment *ad fundandam jurisdictionem* of heirs interest under will.

Mr. Schreiner applied for the attachment *ad fundandam jurisdictionem* of this Court of the interest in the said estate of William Joseph Quin, as heir of Emily Quin, in an action for an account of the administration thereof.

Order granted attaching the property, the order to operate as an interdict to prevent the respondent from passing transfer of the property, the order to be personally served on the respondent and on the Registrar of Deeds.

IN THE INSOLVENT ESTATE OF RICHARD DAY.

The Court, on the application to Mr. Juta, appointed Mr. H. F. East provisional trustee.

IN THE WHITE HOUSE MINING AND DEVELOPING SYNDICATE.

On the motion of Mr. Searle, the Court granted the powers conferred by the 15th section of the Winding-up Act to the liquidators in the above-named syndicate.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Liquidators' Second Report.

Mr. Juta presented the second report (annexed) of the liquidators in the above bank, and asked that the authority given to certain gentlemen some time ago to inspect the books and other documents of the bank should not be extended to the securities held by the bank.

The Court ordered the liquidators not to allow inspection of the securities pending the receipt of notice by the gentlemen referred to in the previous order.

THE REPORT.

1. The following balance-sheet shows the condition of the bank's affairs upon the 19th September, the date of the stoppage of the bank:

LIABILITIES.		(DR.)
To capital paid up	£175,000	0 0
Reserve fund	60,000	0 0
Contingent account...	17,345	15 1
Bad and doubtful debt fund ...	133,828	19 0
Profit and doubtful loss account...	15,961	6 7
Surplus cash	13	16 5
Interest in suspense	15,220	8 4
Unclaimed balance	1,050	5 5
Notes in circulation	113,262	0 0
Current accounts, credit balances	569,558	3 9
Fixed deposits	1,343,723	16 11
Interest due on fixed deposits ...	24,256	19 10
Rebate on bills not yet due ...	72	1 0
Dividends unpaid	587	0 0
Balance due to other banks ...	42,203	7 2
London and Westminster Bank (see contra)	214,285	14 5
Adjusting account	783	7 8
Bills payable...	58,164	18 2
Bills for collection	193,411	8 0
	£2,978,729	7 4

ASSETS.		(CR.)
By cash advanced to head office and branches	£207,778	16 11
Remittances *in transitu*	94,181	8 1
Cheques and notes of other banks	5,264	0 3
Bank premises and furniture ...	46,292	8 7
Properties account	30,569	6 8
Bills discounted current	614,022	7 9
Part due bills	103,633	11 7
Bills of exchange	28,471	11 2
Bills of exchange in hands of the London and Westminster Bank as cover for £214,285 14s. 5d. (as per contra)...	230,714	16 8
Current accounts overdrawn (partly secured)	1,010,897	0 4
Loans specially secured	384,760	9 8
Balances due by other banks ...	23,892	2 4
Specie insurance account	169	19 7
Native gold advance account ...	4,302	0 0
Stamps in hand	3,165	18 8
Stationery	2,802	15 1
Bills deposited (as per contra) ...	193,411	8 0
	£2,978,729	7 4

2. On the 14th October, 1890, the official liquidators presented to your honourable Court a preliminary or first report, in which they asked for a call of £30 per share, which was sanctioned by an order of Court on the 28th October, 1890.

3. On the latter date, a payment of a dividend of 5s. in the £ was also sanctioned, and the official liquidators were authorised to borrow from the Standard Bank, upon terms stated, whatever money

might be needed to enable them with the money then in hand to make the above payment.

4. This dividend was notified as payable on the 18th November upon all claims proved up to the 3rd October. The great mass of claims coming in, and the inconvenience which would have resulted to many creditors had the liquidators delayed payment of any portion until all could be paid simultaneously, rendered it advisable to pay out the dividend in the order in which claims had been proved. Similarly the payment of the dividend upon all claims proved up to 30th November last was begun upon the 15th January, and is still being continued.

5. The date originally fixed by your honourable Court for the filing of claims was the 30th November, but as considerable numbers of claims were still unproved on that date, the official liquidators moved your honourable Court to extend the time to the 28th February, which was sanctioned.

6. With respect to the power given by your honourable Court for the borrowing of money from the Standard Bank, it will be seen from the statement below that there was no necessity for this course, moneys having been collected by the liquidators to a sufficient amount to enable them to pay the dividend without any further aid.

7. Upon the application of a small number of creditors in the South African Republic, representing only a small amount of debt, the High Court at Pretoria appointed three provisional liquidators to take charge of the books and assets in that Republic. As it was considered unusual and objectionable that such an appointment should be confirmed, and a separate liquidation be thus established there, the liquidators felt it their duty to oppose this course. After considerable litigation of an expensive and vexatious character, the liquidators were placed in possession of all the assets in the South African Republic by a judgment of the High Court on the 15th November, 1890. One of the liquidators (Mr. H. J. Feltham) proceeded to the Transvaal towards the end of September, and is still there engaged in supervising the liquidation of the various branches in that country. The Court required the liquidators to choose a *domicilium* there, and further reserved the question of the remuneration of the provisional liquidators, which has since been fixed by the High Court at the sum of £1,135.

8. The total number of claims received up to the 31st January was 6,428. The total amount of claims proved and admitted up to the 31st of January last was £1,929,920, and for these cheques have been issued for the dividend of 5s. in the £, amounting to £482,480. Other claims are still coming in, and will have to be received up to the 28th February. Owing to the fact that "set-offs" are still being claimed and variations made during adjustment, the liquidators are still unable to make an exact statement of the total liabilities upon which dividends will be payable. The liabilities at the stoppage of the bank were £2,152,277; from this there has been made up to December 31 a reduction of £110,188 for "set-offs" or from other causes, leaving a net amount of £2,042,189 as the estimated net liability upon which dividends must be paid; subject, however, to further variation.

9. Up to the 29th ultimo in the Colony, and up to December 31 in London, the official liquidators had received, and had to their credit at the Standard Bank, the sum of £1,033,422. The dividend of 5s. in the £ would absorb of this an estimated sum of £510,585. The amount of dividend warrants actually reported as paid up to the 29th ultimo was £405,348.

10. There remained therefore at the date of the last return the sum of £522,887 available for a further dividend, being more than sufficient to pay 5s. in the £. The liquidators, therefore, now ask the sanction of the Court to their making a further payment of 5s. in the £, and also to their paying subsequent dividends as the funds collected by them from time to time will admit.

11. In their first report the liquidators estimated the amount recoverable from the call of £30 per share at £825,000. The amount actually received up to the 29th January was £238,871. The liquidators are of opinion that the amount originally estimated will prove to be nearly correct.

12. The liquidators are now engaged in taking advice as to the proper steps to be adopted to recover from former shareholders in cases where transferees now on the list have failed to pay their calls in full.

13. The bulk of the securities consist of shares of which a large proportion are shares in gold-mining companies. The liquidators have not considered it prudent in the face of a market showing signs of recovery from an extreme and probably undue depression to realise any large quantity of these.

14. With reference to the application which was made on the 9th December, 1890, to the Court, by certain creditors and shareholders, to inspect the books and accounts of the bank, and which application was granted, the official liquidators desire very respectfully again to impress upon the Court their conviction of the serious damage which will ensue to the bank's interests if the nature or number of the securities held by the bank should become known, and they would again urge in the interests of the liquidation that these and the records of them, be excluded from examination until they have been realised.

15. It has been found necessary to consider a number of propositions for compromise. The first lot of 20 was confirmed by the Court on the 20th of January. The liquidators have in hand up to

the present time more than 70 further proposals, besides six sworn declarations of complete destitution and inability to pay anything, all of which require, and are receiving, careful inquiry and consideration.

16. The official liquidators find that the weakness and ultimate cause of ruin to the bank arose from the system of heavy overdrafts and loans on security of scrip liable to extreme fluctuations in value, joined with the taking of fixed deposits to a large amount, and the absence of an adequate reserve of gold, or of readily negotiable securities. These advances were made to a greater or less extent at all the branches, the largest amounts being at Kimberley, Johannesburg, and Port Elizabeth. Names in themselves entirely unworthy of credit are to be found in the books as debtors to large amounts against scrip which is now in many cases reduced to an enormous extent, and in some cases has no value whatever. A further cause appears to have been a want of discipline in the management of the bank and a failure on the part of the directorate and management in the maintenance of an effective control over the managers of branches.

17. Many rumours having been afloat respecting the position of the directors in regard to the bank at the time of its stoppage (independently of their calls on shares), the liquidators think it right to state that two of their number are debtors to a large amount, and the bank is likely to be a heavy loser on the accounts. Of one of these it may be said that he was a debtor in a considerable sum before he became a director, and of the other, that his name and well-known connections would no doubt have obtained, and did in fact obtain for him, elsewhere, equal facilities for borrowing, even had he not been a director. The bank will not lose money on advances or overdrafts by any other director. On this subject the liquidators would further state that the report in circulation at the time of the bank's stoppage, to the effect that the chairman had withdrawn, just before the closing, considerable sums of money, had no foundation in fact.

18. The liquidators have endeavoured to form an estimate of the present value of the bank's remaining assets, with a view to enabling creditors to form some opinion as to further dividends. They regret that they have been unable to arrive at any satisfactory result. The debts still due to the bank are many of them of very doubtful character, and some of them will require considerable time and indulgence for their ultimate liquidation; further, the share assets are to a great extent of doubtful or uncertain value. If the circumstances of the Colony generally improve, there is no doubt that the assets of the bank will improve with them. Upon the whole, the liquidators would not feel justified in going beyond a statement of their belief that a further dividend of 5s. in the £, in instalments extending over a considerable period, will probably be paid.

19. The liquidators beg to bring to the notice of the Court that they have been assiduously and anxiously engaged in the business of the bank's liquidation (to the almost entire exclusion of other pursuits) since their appointment, and they respectfully request the Court to fix their remuneration in respect of their past and future services.

20. The liquidators now ask the Court to sanction:

1. The payment of a second dividend of 5s. in the £, to be payable on and after March 2 next.

2. Permission to pay subsequent dividends as funds in hand may from time to time allow.

3. The exclusion of the share or other securities held by the bank, or the record of them, from the inspection sanctioned by the Court of the books and accounts of the bank.

4. And to fix the remuneration of the liquidators for their past and future services.

PHILLIPS V. PHILLIPS.

This was an action for divorce instituted by the plaintiff against his wife, on the grounds of her desertion.

Mr. Giddy appeared for the plaintiff, who, on being examined, stated that he was married to the defendant in a registry office in England on November 7, 1878; that he and his wife lived together for about three weeks after their marriage, when she left him and returned to her father's house, and refused to live with him any longer, from conscientious motives.

The marriage certificate was not produced, and the further hearing of the case was postponed till the receipt of the certificate from England.

DESSAUER V. DESSAUER.

Mr. Searle for plaintiff; the defendant in default.

Rule *nisi* granted, calling upon defendant to show cause why a decree of divorce should not be granted.

SUPREME COURT.

TUESDAY, FEBRUARY 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. BRIEL.

Mr. Justice Buchanan, in reviewing this case which had come from the Special Justice of the

Peace at Calitzdorp, remarked that the accused was charged with contravening Act 18 of 1873, section 2. He was engaged to accompany the complainant on a fifteen days' journey, but failed to fulfil his engagement. As the section only applied to servants employed on farm work, or engaged in agriculture, and as the accused had not been so engaged and had been charged under a wrong section, the conviction must be quashed.

IN THE MATTER OF MARGARET MARIA HORSFALL.

On the motion of Mr. Graham, the discharge was granted under the 117th section of the Insolvent Ordinance.

THOMAS ARTHUR ASKEW V. JOHANNES MARTHINUS MOLLER.

Mr. Graham, on behalf of the applicant, asked that the rule *nisi* granted on the 22nd January, 1891, might be made absolute.

The Court ordered the debt to be attached, notice of the attachment to be served on the defendant and on the Registrar of Deeds, and to be published in the *Government Gazette*, so much of the rule *nisi* to be made absolute as gave leave to the applicant to sue by edictal citation.

ROSS V. SCOTT AND ARMSTRONG.

Partnership—Statement of account—Alleged breach of agreement — Dissolution by mutual consent—Counter-claim.

Mr. Searle, with Mr. Jones, appeared for plaintiff.

Mr. Schreiner, with Mr. Castens, for the defendants.

From the opening statement of counsel it appeared that this was an action instituted by the plaintiff to recover the sum of £327 1s. 10d., alleged to be due to him upon a statement of partnership accounts. The declaration alleged that the plaintiff and defendants entered into partnership as brokers on the 1st August, 1889; that the partnership was dissolved by mutual consent on the 31st October, 1889; and claimed the sum of £327 1s. 10d.

The defendants in their plea denied liability, alleged that plaintiff had failed according to agreement to contribute £1,000 to the partnership, and counter-claimed for £509 0s. 11d. Upon these facts issue was joined.

Mr. Ross, the plaintiff, on being examined by Mr. Searle, stated that he was in business in Cape Town as a broker in July, 1889, and that his business was a flourishing one. Towards the end of July the defendant Scott came to him and told him that he was very dissatisfied with Armstrong's business capabilities, and that if he and plaintiff were to enter into partnership they ought to do very well; subsequently it was agreed that Armstrong should continue a member of the firm. Scott mentioned that it would be well if plaintiff could either contribute £1,000 to the firm or find security for that amount, as Armstrong was prepared to find a similar amount. He told Scott that he was prepared to contribute £1,000 if he and Armstrong also put in £1,000 each. He had scrip at that time worth about £700, and he could have drawn upon his brother in Klerksdorp for the balance. Witness further stated that he had contributed £136 5s. to the firm, being the proceeds of fifty Exchange shares sold by the firm, that he valued his own furniture at £41 15s., and the furniture supplied subsequently to the firm at £82 6s. 5d. He remained in the business about three months. During the first month the firm had done very well, but in the second month business began to fall off. When Scott spoke to him about contributing £1,000 he said he was ready to do so if Armstrong contributed a similar amount. The boom was on, and the firm made, according to Armstrong, £2,000 in the first month of the partnership. When he had been in the firm a short time he found that clients complained of the methods in which business was being done. He told Scott about the middle of October that he would leave the firm at the end of the month. Mr. Armstrong went to the Rand about the 21st October on business, but he did not consider that he would be entitled to any share in the profit which might have been the result of that trip. He was doing a very good business before he went into partnership with Scott & Armstrong; his turn-over in July was £22,000.

Cross-examined by Mr. Schreiner: The turn-over of the firm in August might have been £132,000. He could not say when Scott first asked him to enter the firm, but he thought it was one day after 'Change as they were walking down towards the jetty. He was introduced to the manager of the Bank of Africa as a new member of the firm, and promised to transfer his balance from the Cape of Good Hope Bank. Armstrong was never present when the £1,000 was mentioned. Mr. Scott never insisted on his putting in the £1,000. He frequently mentioned the matter, but always said that he would pay in his £1,000 when Armstrong had paid his. Mr. Graaff was first suggested to him by Scott as a surety. He did sign a document that he would be liable for one-third of all losses sustained whilst he was a member of the firm. He did not borrow £100 from Scott on the 31st October. He considered that that amount was due to him.

Mr. Schreiner: Your means at present are rather limited, Mr. Ross? If judgment were given against you for £500, could you satisfy it?

The Chief Justice: With what view is that question asked?

Mr. Schreiner: To show plaintiff's position with regard to defendants.

The Chief Justice: I don't know what plaintiff's present position has to do with the matter.

Mr. Schreiner: It is a matter of credibility. Messrs. Scott & Armstrong were only too glad to wash their hands of Mr. Ross.

The Chief Justice: The witness may be in the most reduced circumstances at present, and may have been a wealthy man in October, 1889; so why should you put the question now—it is utterly irrelevant?

Mr. Frost Bonnes, accountant, was examined and gave evidence as to certain items in dispute.

Mr. Scott and Mr. Armstrong in their evidence denied most of the statements made by the plaintiff.

Mr. Kirkman, the firm's bookkeeper, and Mr. George Cosnett were then examined.

Upon the conclusion of the arguments of counsel the Chief Justice delivered judgment. He remarked that there were three matters in dispute: (1) As to whether plaintiff was liable for a third of Armstrong's expenses to the Rand; (2) as to whether the furniture had been fairly valued at £33 15s.; and (3) whether plaintiff was liable to contribute £1,000 to the firm. With regard to the first point, the Court were of opinion that plaintiff was a partner when these expenses were incurred, and therefore was liable for a third share. With regard to the second point, they considered £33 15s. a fair value for the furniture. Regarding the last point, they were of opinion that there was not sufficient evidence of an agreement that the plaintiff should contribute £1,000 to the firm. Judgment would be for the plaintiff for £117 9s. 6d. with costs.

SUPREME COURT.

WEDNESDAY, FEBRUARY 4.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

LEVIN V. GARLICK.

Interdict on money in hands of third person—Set-off—Promissory notes not yet due—Contempt of Court.

Mr. Schreiner and Mr. Castens for plaintiff. Mr. Searle and Mr. Molteno for defendant.

This was an action instituted by the plaintiff against the defendant and Johnson & Co., of Klerksdorp, for the sum of £75 7s. 8d.

It appeared from the opening statement of Mr. Schreiner that on the 28th October last a rule *nisi* had been obtained which operated as an interdict to restrain defendant from paying to anyone except the plaintiff certain moneys belonging to the firm of Johnson & Co., but on that date in the possession of the defendant Garlick. The money in question (£1,538 6s. 4d.) had been handed over to the defendant Garlick by the Commercial Insurance Company of Cape Town, in satisfaction of a claim by Johnson & Co., in respect of a policy of fire insurance, their premises in Klerksdorp having been destroyed by fire in August last. It further appeared that the defendant refused to pay Levin his claim, and in violation of the interdict set off the money in his hands against certain promissory notes accepted by Johnson & Co., in favour of the defendant, but not yet due.

Mr. Garlick, examined by Mr. Searle, stated that he had had dealings with Johnson & Co., of Klerksdorp, and in fact supported that firm. In August last he received a wire informing him that the premises of Johnson & Co. had been destroyed by fire. A few days afterwards he received a letter from Johnson & Co., covering policy of insurance, and giving him instructions to pay Levin £75 7s. 8d., as soon as he had recovered the amount of the policy from the Insurance Company. The Insurance Company did not pay the money at once, as they were making inquiries into the circumstances attending the fire. Mr. Levin called upon him and asked him to guarantee the payment of his debt. Witness refused to do so unless Mr. Levin allowed him 10 per cent. on the amount for the risk he ran. The plaintiff declined to do this and he refused to pay him the money. On 21st October he received £1,538 6s. 4d. from the Commercial Insurance Company, and on the following day he received a wire from Johnson & Co., instructing him to immediately wire that firm £50 and to retain the balance. Levin called upon him the next day when he showed him Johnson's wire. He then again refused to pay plaintiff on the grounds that he had no authority to do so, but told him that Johnson would be in Cape Town in a few days. The interdict was granted on the 28th October. He held two bonds as security from Johnson & Co., one for £700 and the other for £500. He saw Johnson on his arrival, and they came to an arrangement that the money in witness's possession was to be set off against Johnson's account, and that the bills were to be returned to Johnson. Johnson was unwilling that he should pay Levin, but he (witness) was willing to make an arrangement with Levin. He had no misunderstanding whatever with Mr. Levin.

The Chief Justice: There was no misunderstanding, but you looked after yourself (Laughter.)

The witness further stated that he gave Mr. Johnson £55 before the latter left Cape Town.

Cross-examined by Mr. Schreiner: He did not agree to pay Mr. Levin, but he would have done so had it not been for the wire of the 22nd October. He was served with the interdict on the 28th October. He did tell Johnson that he could pay no one owing to the interdict. Johnson was not annoyed because he had not paid Levin.

Baptist Hogset, defendant's bookkeeper, was called, and corroborated the defendant's evidence respecting the interviews of Levin and Garlick with regard to the guarantee and the giving up the bills to Johnsen.

Mr. Arthur George Syfret proved that he, as representing a Port Elizabeth firm, had a claim of £215 against Johnson & Co., which he subsequently ascertained had been settled.

Mr. Searle then proceeded to argue in support of the defendant's case.

The Chief Justice: Well, Mr. Searle, your client has been guilty of disobeying the order of the Court, though it is clear he had no intention of doing so. We shall therefore place him in exactly the same position as if he had not disobeyed the order of Court.

Mr. Searle: Well, my Lord, if that is the case, the more logical course would be to commit him for contempt of Court. (Laughter.)

The Chief Justice: We shall be more merciful to your client than you seem to be. (Renewed laughter.)

The Chief Justice, without calling upon Mr. Schreiner, delivered judgment to the following effect. The plaintiff wishing to sue Johnson & Co., which firm was not domiciled in the Colony, obtained an order of Court attaching money in Garlick's possession. If at the time of the order Mr. Garlick was entitled to set off the money against debts owing to him the order of Court would not have affected him. But the facts are that there were no debts due; the promissory notes had not yet fallen due. Mr. Garlick must be placed in the same position as if he had paid a third party. Judgment will be for the plaintiff with costs.

LANE AND HOLMES AND SON V. SORENSEN, IN RE "SAGA."

Ship—Cesser of charterer's liability—Lien by shipowner for freight, dead freight and demurrage—Custom of port—Case governed by English law.

Sir T. Upington, Q.C, and Mr. Schreiner, for appellants.

Mr. Searle and Mr. Molteno for respondent.

This was an appeal from the Court of the Eastern Districts. The case was tried before the Judge-President in Port Elizabeth, when the respondent, the captain of the Norwegian barque "Saga," sued the appellants (the defendants in the Court below) for £862 10s., demurrage and damages alleged to have been sustained by delay in discharging his ship. It appeared from the evidence, which was very voluminous, that on the 24th of May, 1889, a charter party was entered into at London between Messrs. Hofman, Schenk & Co., agents of the barque Saga, and Henry Marriott, agent of Walter Lane. By the charter party it was agreed that the Saga should proceed to Fredrikstad, in Norway, and there load from the factory of Walter Lane a full cargo of timber, and after loading, should proceed to Algoa Bay, in this colony, and there deliver the same to the said Walter Lane, or his assigns. The "Saga" arrived in Algoa Bay on December 5, 1889, and on December 7 Captain Sorensen gave Lane notice of his arrival, and of his readiness to discharge. On the same day Lane informed Sorensen that Holmes & Son were the holders and indorsees of the bills of lading, and authorised the delivery of the timber of them. Sorensen then gave Holmes & Son notice that he was ready to deliver the timber. Holmes & Son admitted that they were the holders of the bills of lading, and accepted all responsibility as such under the same. The bills of lading were made subject to demurrage and all other conditions as per charter party. It appears that just at this time there was an unusually large number of ships awaiting discharge in Algoa Bay, and that the boating companies had great difficulty in coping with the work, in consequence of which the "Saga" was not discharged till 11th March, 1890. On the 18th October, 1890, by consent and request of parties, judgment was entered for the respondent for £188 10s. and costs. From this judgment the appellants now appealed.

The arguments are sufficiently set forth in the judgment, which was delivered on the following day.

SUPREME COURT.

THURSDAY, FEBRUARY 5.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

LANE V. SORENSEN.

The Chief Justice, in giving judgment, said: This was an action for demurrage brought in the Port Elizabeth Circuit by the master, on behalf of the owners, of the barque "Saga" against the first defendant, Lane, as charterer of the vessel, and

the second defendant, Holmes, as receiver of the cargo under a bill of lading. The charter party contained the following provisions: "Cargo to be brought alongside and taken from alongside at the charterer's and consignee's risk and expense. .... To be discharged as fast as the custom of the port will allow, and ten days on demurrage over and above the said lying days at 4d. per ton register per day. . . . This charter being entered into by the charterer as agent for others, his liability shall cease as soon as the cargo is shipped, but captain to have a lien upon the cargo for all freight, dead freight, and demurrage. .... The words demurrage and all other conditions as per charter to be inserted in the bills of lading. The ship to be addressed to Mr. W. Lane, Port Elizabeth, paying 2½ per cent. commission on the gross amount of freight." The vessel arrived in Algoa Bay on the 5th of December, 1889, and on the 7th of that month the plaintiff gave notice of her arrival to Holmes, and asked him to give her a quick despatch. On the 23rd of December the first defendant wrote as follows to the plaintiff: "I, the consignee of your ship, the "Saga," hereby authorise you to deliver your cargo of deals, &c., to Messrs. T. Holmes & Son (the second defendant), of this town, and hold you harmless from any losses occasioned by your so doing, instead of to myself." The discharge of the cargo was commenced on the 16th December, 1889, and was completed on the 27th of February, 1890. The plaintiff, in his declaration, alleged that, according to the custom of the port, the vessel could with ease have been discharged before the 21st of January, and claimed the sum of £362 10s. as demurrage. The case was heard before Sir J. Barry at the Port Elizabeth Circuit Court. The first defendant pleaded in effect that his liability had ceased, according to the provisions of the charter, as soon as the cargo was shipped, and that, as he was only the addressee of the ship and not consignee of the cargo, no further liability attached to him. The second defendant, while admitting that he was the holder and endorsee of the bill of lading, and had accepted all responsibility as such, and that the bill of lading was made subject to the demurrage and other conditions of the charter, put the plaintiff to proof that Marriott, the nominal charterer, was the agent of the first defendant. Both defendants denied the allegation that the cargo had not been discharged as fast as the custom of the port would allow. The Court decided against the defendants on all grounds, and gave judgment against them for £188 10s., being demurrage for twenty-six days from the 1st of February, 1890, at £7 5s. per day. Against this judgment the defendants appealed, but owing to the insolvency of the second defendant his appeal has fallen to the ground, and the liability of Lane alone remains to be considered. The main question raised on appeal is whether, assuming that demurrage was payable, the appellant is liable to pay it in whole or in part? The learned judge held that until the cargo was shipped both Marriott and Lane were liable, but that inasmuch as Marriott was the agent for Lane his liability ceased and that of Lane continued as charterer. "I cannot think," he adds, "that it was ever contemplated by the owners to abandon the claim which the law gave them against the undisclosed charterer." It is unnecessary, in the view which I take of this case, to consider the law relating to the liability of undisclosed principals, because, in my opinion, the object of the cesser clause was to release the charterer, whoever he might be, from liability. To apply the language of Lush, J., in "Christoffersen v. Hansen" (L.R. 7, Q B. 509), the lien given to the shipowner on the cargo for demurrage, as well as for freight, was an equivalent advantage for absolving the charterer altogether. The charter states that it was "entered into by the said charterer as agent for others," and because the only person whose name appears on the charter party as charterer is Marriott, it is contended that his principal, although charterer, was not intended to be released from liability for demurrage as soon as the cargo was shipped. But, for the purposes of the charter party, Marriott and Lane were really one and the same person, and the others for whom Marriott, as representing Lane, was agent was the intended consignee of the cargo, viz., Holmes. His firm imported the timber, of which the cargo consisted, through Lane, who employed his London agent to enter into the charter party for him. Any benefits, therefore, intended to be given to the charterer were intended for Lane equally with Marriott. Certainly the reason which have induced the English Courts to absolve the charterer in several cases under the ordinary cesser clause would equally apply where that clause is prefaced by the statement that the charter is entered into by the nominal charterer as agent for others. I quite agree with the view that in the decision of this case the Court should be guided by the English law, and I therefore proceed to refer to a few of the English cases. In "Bannister v. Breslauer" (L.R 2, C.P. 497) the charter party contained the following clause: "The charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for freight, dead freight, and demurrage, which he, or owner, shall be bound to discharge." It was held by the Court of Common Pleas that the plea that the cargo was worth the freight on arrival at the port of discharge was a good answer to an action by the shipowner against the charterers for delay in loading the vessel. All the judges laid

stress upon the circumstance that the charter gave a lien upon the cargo for demurrage, and Keating, J., added: "I do not think it is straining the language of the charter party to say that the charterers meant to free themselves from all liability, in respect of which the plaintiff would be obliged to have recourse to an action upon the charter party." In "Franceso v. Massey" (L.R. 8, Ex. 101), a charter party made by the plaintiff to the defendant contained the following clause: "Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." It was held that the lien extended to demurrage at the port of loading as well as at the port of discharge, and, as a consequence that the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading. Bramwell, B., referred with approval to the reasoning of Lush, J., in the case which I first cited and added: "And so he holds liability for freight is given up but not liability for damages from delay in loading, *because* there was a lien for freight but none for such damages." In the present case much stress was laid by the Court below on the argument that Lane was consignee of the cargo as well as charterer of the ship. "In the absence of any other evidence," said Barry, J., "Lane, the addressee and charterer, must be assumed to be the consignee. This character, moreover, Lane does not repudiate when addressed as such. Nothing could be a clearer admission by Lane that he was consignee than when on December 23 he addressed the plaintiff by letter," in which he refers to himself as consignee. I do not find among the correspondence produced any letter addressed to Lane as consignee to which this letter of December 23 is an answer. In this letter Lane speaks of himself as "consignee of the ship" and not of the cargo, and it is quite possible that he used the term in the loose sense in which it is often employed as meaning the person to whom the ship has been addressed. But even if he meant to say that he was the consignee of the cargo, the admission ought not to be pushed against him further than the actual facts would justify. In fact, according to the evidence of Forbes, which is uncontradicted, the bill of lading came by post, and was sent by Marriott through the bank to Lane. Lane notified to Holmes (the second defendant) that the bill of lading was at the bank and that Holmes was to provide for the payment of the draft which Marriott had drawn against the bill of lading. Taking this evidence in connection with the fact that Holmes had ordered the timber through the agency of Lane, it is difficult to hold that Lane and not Holmes was the real consignee of the cargo. Even if he was consignee it would not follow that he is liable in an action brought against him solely as charterer. An instructive case upon this point is that of "Sanguinetti v. Pacific Steam Navigation Company (L.R. 2, Q.B. Div., 288) which is not referred to in the learned judge's reasons. That was an action for demurrage against a charterer who was also consignee of the cargo. The defence was that the liability of the defendant had ceased on the loading of the cargo. This defence was sustained, and it was held there was a lien for demurrage, that therefore the cesser of liability clause applied, and that the fact that the defendant himself was consignee as well as charterer made no difference in the construction of the clause. The case is a very strong one, because the defendant's agent had himself required the plaintiff to deliver the cargo without enforcing his lien for demurrage. Mr. Benjamin, as counsel for the shipowner, pointed out that the case differed from all others reported on the subject inasmuch as in other cases the charterer and consignee of the goods were different persons. "The general custom," he said, "is for the merchant abroad to employ a correspondent in England to charter the ship and consign the goods to him. The charterer has no interest in the matter after the ship has sailed. But here the charterers and consignees are the same persons, and they stipulate that instead of paying the freight and demurrage and other charges in England, their agent, who will receive the goods, shall settle them at Callao. The lien on the cargo was only a collateral security, and the plaintiff can give that up without giving up his right to the debt." The Justices of Appeal, however, were not convinced by these forcible arguments. "In my opinion," said Mellish, J. A., "according to the true construction of the charter itself the defendants were free from all liability on the ship's sailing after it was fully loaded. In my opinion the liability did not revive merely because no settlement was arrived at with the charterer's agent, and the shipowner ought to have enforced his lien." Brett, J. A., said: "I come to the conclusion that in this charter party there is a lien for the detention of the ship at the port of loading. There was therefore a right of lien in the hands of the captain upon this cargo in respect of the claim for detention. If that be so . . . . . the absolving clause here, unless it is to be distinguished from the absolving clauses in other charter parties in former cases, will clearly, according to the authorities, absolve the defendants from any claim in respect of any detention at the port of loading." In the present case the detention was at the port of discharge, but the principle applicable is the same. The action proceeds upon the assumption that it would have been possible to discharge the cargo with greater despatch than that which was shown. When it appeared that the cargo would not be discharged within a reasonable time the plaintiff might have landed it himself,

and thus retained his lien for demurrage. Whatever action he may have against the first defendant on other grounds, he has no action against him for demurrage under the charter party. As charterer he is absolved from liability for demurrage at the port of discharge. If he is not liable as charterer he can only be liable if he claimed and received the goods under the bill of lading. His letter of the 23rd December may or may not amount to a guarantee for demurrage, but the action does not proceed on that ground. Nor does that letter show that he ever claimed the goods as consignee. The true explanation of the letter appears to me that, owing to the defective form of the bill of lading, the captain required an indemnity for delivering the goods to the holder of the bill of lading. But whether this explanation be the correct one or not, we have the uncontradicted evidence of the appellant that he had no interest whatever in the cargo as consignee, and that he had no connection with the defendant Holmes except as charterer, through Marriott, of the ship. The fact that he afterwards made common cause with Holmes in the defence of the action, or that his attorney made use of expressions in the correspondence placing him on the same footing with Holmes, cannot alter his legal position. As charterer he has, through his agent, stipulated to be relieved from liability for demurrage, and he has never taken upon himself the liability of consignee by receiving the goods. Under these circumstances it becomes unnecessary to consider whether demurrage was payable at all. That is a question of fact, depending, however, not upon the credibility of the witnesses, but upon the correctness of the inferences drawn by the Court below from facts which in the main are undisputed. *Prima facie* the detention of the ship was unreasonably long, and I certainly think that the onus lay upon the party who would be responsible for demurrage, if any, to explain the delay and to prove that he had employed all the usual methods of despatch according to the custom of the port of Algoa Bay. Upon this point very strong evidence was given for the defendants, but I prefer to rest my judgment upon the preliminary objection raised on behalf of appellant. For the reasons already stated his appeal must be allowed, with costs in this Court and in the Court below.

DE KLERK V. DE KLERK.

Mortgage Bond—Provisional sentence postponed where Mortgagor had denied his signature.

Sir T. Upington, Q.C., prayed for provisional judgment on a mortgage bond for £3,000.

Mr. Juta, on behalf of the respondent, opposed the motion, on the ground that the respondent denied his signature, and asked that the matter might stand over for fourteen days.

Counsel having agreed that the evidence of one of the witnesses to the bond, Mr. J. D. Cilliers, should be taken on commission, the matter was postponed for three weeks.

WESTERN PROVINCE BANK V. MALHERBE.

On the motion of Mr. Molteno, final adjudication of this estate was granted.

STANDARD BANK V. ROBERTSON AND BAIN.

Mr. Schreiner, on behalf of the Standard Bank, moved for the final adjudication of the firm's estate.

Mr. Juta, who appeared for the executors of Bain, argued at great length that Bain had ceased to be a partner of the firm in 1883, and directed the attention of the Court to an agreement made in that year for dissolving the partnership, and to a subsequent agreement made in 1889, varying in some respects the terms of payment of Bain's share of the assets.

Mr. Schreiner contended that Bain had never ceased to be a member of the firm, and in support of his contention called the attention of the Court to the record of a case tried in the Supreme Court some time before Bain's death, during the hearing of which Bain admitted that he was at that time a member of the firm.

The Court made absolute the rule applied for with costs. Sequestration only ordered as to the estate of the firm.

IN THE INSOLVENT ESTATE OF ROBERTSON AND BAIN.

On the motion of Mr. Schreiner, Mr. Herbert Wilman and Mr. John Watson were appointed provisional trustees.

LIQUIDATORS CAPE OF GOOD HOPE BANK V. HENRY HEATH.

Mr. Schreiner applied for the final adjudication of the defendant's estate.—Application granted.

LOUW AND CO. V. J. J. THERON.

On the motion of Mr. Webber, provisional judgment was granted for £264 12s. 8d.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: John Smith and Charles William Wallace.

PETITION OF ADA EMILY PETERS.

Mr. Jones applied, on behalf of the petitioner, for the issue of a commission appointing the Resident Magistrate of St. Mark's to take petitioner's evidence in the suit instituted by her against her husband for restitution of conjugal rights, failing which for divorce.

PETITION OF ELEANOR C. W. HYLAND.

Mr. Searle appeared for petitioner; Mr. Molteno watched the proceedings on behalf of petitioner's brother-in-law.

Mr. Searle asked for the appointment of petitioner and Mr. William Thorne as curators of the estate of petitioner's husband, James G. L. Hyland, who, it was alleged, is unable, through defective mind, to attend to his affairs.

The Court ordered that a summons should be issued in the ordinary course, calling upon the husband to show cause why his estate should not be placed under a curator. Mr. Graham was appointed *curator ad litem*.

PETITION OF HENRY H. OLIVIER AND OTHERS.

Mr. Searle moved for authority to the Registrar of Deeds to pass transfer to petitioners the remainder of the farm Heimer's Rivier, the same having been purchased by them but not transferred by reason of an error.

The necessary authority was given.

THE UNION BANK, IN LIQUIDATION.

Securities in possession of Bank—Refusal to realise—Legal rate of interest.

Mr. Schreiner presented the following petition from the liquidators of the above-mentioned bank: That the Standard Bank of South Africa were, at the date of the winding-up order of the Union Bank, creditors of that institution for the sum of £219,060 or thereabouts, which has been reduced in various ways to a sum of £146,420, exclusive of interest. The Standard Bank holds the bulk of the securities of the Union Bank as security for the due repayment to them of the Union Bank's indebtedness. These securities consist chiefly of promissory notes and bills of exchange, with scrip attached, upon which Wilhelm August Lippert and other insolvent persons are liable. The Standard Bank has not proved any claim against the estate of Lippert or the other insolvents, for the reason that they say they hold the great bulk of their securities merely as collateral security for the indebtedness of the Union Bank, and that they do not therefore consider it incumbent to prove for these securities, as they are satisfied the Union Bank will be able to pay 20s. in the £. That the Standard Bank refuses to hand up for realisation to your petitioners the securities held by them and received from the Union Bank until their claim is paid, or unless some satisfactory arrangement is entered into. That it is impossible to satisfy the claim unless your petitioners are in a position to deal with the securities held by the bank, a large proportion of which are attached to paper bearing the name of A. Beit, which are alleged to be forgeries, and your petitioners are also unable to take proceedings to test the validity of the debts due by virtue of the alleged forged bills. That your petitioners are of opinion that they could not force the Standard Bank either to hand up the securities for realisation or to test the validity of the alleged forged bills; that for the above reasons, the liquidation of the Union Bank is retarded and delayed. That your petitioners and the manager of the Standard Bank have discussed the matters referred to in the premises, and the manager has written your petitioners as follows: "For the purpose of facilitating the liquidation, and in the interest of all concerned, this bank is willing that an order of Court should be obtained in the following terms: (*a*) That the liquidators of the Union Bank be authorised to take over from the Standard Bank all the bills discounted for the Union Bank, and the shares and other securities in connection therewith. (*b*) That the liquidators shall realise the said bills and securities, and shall account to the Standard Bank for the proceeds in account of their claim; any deficiency on such claim, whether in the bills discounted with the Standard Bank by the Union Bank, or otherwise, shall be paid to the Standard Bank in due course by the Union Bank (in liquidation), with interest at five-and-a-half per cent.; the Standard Bank to be paid dividends at the same rate as other creditors upon their claim, less agreed value of securities, such agreed value to be subject to adjustment hereafter." The petitioners are of opinion that it will be to the interests of all concerned in the Union Bank if the Court would sanction such an arrangement.

Mr. Schreiner pointed out that if this arrangement were sanctioned by the Court it would be to the benefit of the contributories.

The Chief Justice: The arrangement seems just as much to be for the benefit of the Standard Bank. He thought that the interest might be reduced considering that the Standard Bank was so satisfied that the Union Bank would pay 20s. in the £. He was not sure that the Standard Bank could not be compelled to realise the securities or hand them over. Pledgees under the Roman-Dutch law stood on a different footing to

what they did by the law of England. Six per cent. was the rate of interest usually allowed, but there was no authority for saying that 6 per cent. was the legal rate of interest in this country. The Court would not sanction the arrangement unless the bank consented to reduce the proposed interest from 5½ to 5 per cent. The other question was a very important one, as to whether the bank could not be compelled to realise or hand over the securities to the liquidators to realise, and he would like to hear it argued before they gave any decision upon it. The present application would be taken as ratified, provided interest were reduced to 5 per cent.

KOTZEE V. KOTZEE.

Mr. Molteno for plaintiff; Mr. Graham for defendant.

Decree of judicial separation granted, costs to be paid out of the joint estate.

SUPREME COURT.

TUESDAY, FEBRUARY 10.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

THE PAARL BANK, IN LIQUIDATION.

Company—Bank in liquidation—Winding-up Act—Absconding contributory—Powers of liquidators in such cases.

Mr. Schreiner, who appeared on behalf of Mr. L. van der Byl, moved that leave might be given to the applicant to proceed to England by the R.M.S. *Athenian*. It appeared from the statement of Mr. Schreiner that the applicant is on the list as a contributory to the above bank, that he had made satisfactory arrangements for meeting the claims of the bank against him, and that he had applied to the liquidators for their consent to his going to England, but that they had refused to grant their consent until application had been made to the Court.

The Chief Justice: What have we to do with Mr. Van der Byl's going to England?

Mr. Schreiner pointed out that under the Winding-up Act powers were given to the liquidators to have an absconding contributory arrested. In this case, however, there was no question of absconding. Mr. Van der Byl was leaving with the full knowledge of the liquidators, and had made arrangements to meet any claim made against him in his absence, but as the liquidators were anxious, before giving their consent to obtain the sanction of the Court this application had been made.

Sir T. Upington, Q.C., who appeared for the liquidators, did not oppose the application.

The Chief Justice: No order will be made, as the application is an unnecessary one. If the liquidators are of opinion that a contributory is about to abscond it is for them to put the machinery of the law in motion.

HYLAND V. HYLAND.

De lunatico inquirendo.

This matter was before the Court on Thursday last, when an order was made for the issuing of a summons calling upon the defendant to show cause why he should not be declared of unsound mind and incapable of managing his own affairs. The case now came on for hearing.

Mr. Searle appeared for the plaintiff, Mr. Graham for the defendant as *curator ad litem*, and Mr. Molteno watched the proceedings on behalf of the defendant's brother.

Mrs. Hyland (the plaintiff), called by Mr. Searle, stated that she was the wife of the defendant, Mr. James Hyland, and had been married about nine years, there being two children of the marriage. Her husband was a shipwright. About twelve months ago she for the first time noticed something peculiar about her husband, and during the past six months he had been getting worse. He was not violent, but his memory was very defective and at times he paid no attention to anything going on around him; though sometimes he talked most rationally. She was of opinion that in his present position he was incapable of managing his own affairs.

Mr. Graham informed the Court that he had had a prolonged interview with Mr. James Hyland, and although the latter appeared to be very restless in his manner and decidedly peculiar, still his memory appeared to be fairly clear upon some points, and he (Mr. Graham) could not consent to the defendant being declared of unsound mind, though he had no objection to a *curator bonis* being appointed.

Mr. Molteno, in cross-examination, elicited from the plaintiff that all the correspondence which had passed between her husband and his brother had been written by her husband.

Dr. Alexander Abercrombie, examined by Mr. Searle, stated that he had known Mr. Hyland about eight years, during which time he had enjoyed good health up to about five or six months ago. He had examined the defendant recently and found him restless, stupid and dull, and his

memory very deficient. He was of opinion that defendant was not capable of managing his own affairs. He attributed defendant's mental weakness in a great degree to drink.

Dr. Schultz corroborated Dr. Abercrombie's evidence with regard to Mr. Hyland's mental condition. The first time he was called in to see Mr. Hyland he was of opinion that the defendant was suffering from acute mania.

The defendant was then called, and said he wanted someone to look after his affairs as he sometimes felt unwell.

The Court found the defendant mentally unfit to manage his own affairs, and appointed Mr. E. R. Syfret *curator bonis*, the defendant to have leave at any time to have the appointment set aside upon showing cause.

BEVERN'S EXECUTORS V. ELY.

Balance of account—Action—Disputed items.

Mr. Schreiner and Mr. Jones for the plaintiff.

The Attorney-General and Mr. Watermeyer for the defendant.

This was an action to recover the sum of £62 17s. 6d., balance of account alleged to be due by the defendant.

Mr. Schreiner, in opening the case, stated that the plaintiffs were the executors testamentary of the late Henry Bevern, and that they carried on the business of the deceased as furniture warehousemen and upholsterers in Cape Town, and that the defendant was a livery-stablekeeper living in Rondebosch, and was formerly proprietor of the Fountain Hotel, Pretoria. Defendant had transacted business with the firm for some three years or thereabouts, and in 1890 there was a debit balance against him of £243 2s. In April, 1890, the defendant paid by cheque £180 4s. 6d., leaving the balance of £62 17s. 6d. which was now sued on. The defendant pleaded that the £180 4s. 6d. paid by him in April last was in full settlement of his account. He further disputed several items in the account rendered by the plaintiffs, and counter-claimed for £51. The principal items in dispute were as follows: (*a*) £25 12s., advertisements inserted in the *Cape Argus* and subscriptions to that paper, which had been paid for by the plaintiffs on behalf of the defendant; (*b*) £21, being for repairs to billiard-table cushions, also paid for by plaintiffs; (*c*) £10, cash advanced; (*d*) £6 5s. 6d., sundries.

Mr. Clement Modlin Gibbs, called by Mr. Schreiner, stated that he was one of the executors testamentary under the will of the late Henry Bevern, and one of the plaintiffs in the present suit. The firm supplied defendant with furniture in 1887, 1888, and 1889. He did not personally sell any of the furniture; he kept the books, and did the correspondence. He remembered receiving an order from Mr. Ely for a billiard-table. The firm's agent in London was instructed to buy the table and ship it by the first steamer. On the arrival of the table it was forwarded to Mr. Ely. No trade profit was charged, only a commission of 5 per cent. Mr. Ely at first declined to take the table on the grounds of its being too dear. When another purchaser had been found, Ely consented to take the table, and no complaints were made about it. The claim of £21 was for repairs executed to billiard-table cushions at the request of the defendant. On the authority of the defendant, advertisements were inserted in the *Cape Argus*, and subscriptions paid for that paper. He saw Ely in November, 1889, and referred to the amount paid to the Argus Company, when defendant told him to try and recover the amount from the Fountain Hotel Company, Pretoria. Some time previous, when he had heard that defendant had sold the Fountain Hotel, he had written to Ely to know if the advertisements in the *Argus* were to be continued, but had received no reply, and in consequence had continued the advertisements. The £10 had been paid to defendant in witness's office.

Cross-examined by the Attorney-General: He took no personal part in selling, but his partner, Mr. Alfred Bevern, could of course reduce the price at which an article was marked. No trade profit was made on the billiard-table, and the commission of 5 per cent. was subsequently abandoned, on defendant's complaint that the table was too dear. He never made any agreement to make good defects which might exist in the table. It was one of Thurston's, and he considered that quite sufficient to ensure its being a good table. The £21 charged for repairing the cushions was fair and reasonable. The £10 paid to Mr. Ely was handed over in his presence to Mr. Rankmore. He left for England on July 8, 1889.

Mr. Alfred Bevern, who corroborated the evidence of the last witness, denied that he had met defendant in August, 1889, or spoken to him on the subject of the cushions.

Mr. Herbert Edward Riches stated that he was the manager of Thurston's business in Cape Town. Shortly after he opened cushions were sent to him for repair. The cushions had been very badly used. Mr. Ely came to his store, and asked if his cushions were ready. The charge of £21 was moderate, and was much less than would have been charged if they had been sent to England.

William Edward Ely, examined by the Attorney-General, stated that he told the plaintiffs (Gibbs & Bevern) that if he could not get a billiard-table from Peach & Co., of Kimberley, he would give them an order for one on their undertaking to supply any defects which might be found

existing in the table. When the table was unpacked it appeared to be in good order, but afterwards his customers complained that the cushions were too hard and refused to play matches on it. He never allowed his guests to sleep on his billiard-table. He sold his hotel in February, 1889, and acquainted plaintiffs with the fact. He arrived in Cape Town in June, 1889, and went to see Mr. Bevern on the same day. Mr. Bevern told him that the cushions had not yet arrived. Some time afterwards he met Mr. Bevern and he told him that the cushions had been mislaid, but that he would have them repaired at his own (Bevern's) expense. He had paid Mr. Bevern £10 to pay for two tables which had been bought from Mr. Stigant. In March, 1890, on receiving a statement of his account, he had offered Mr. Bevern £180 4s. 6d., in full settlement, but this offer was declined, but subsequently accepted, by Mr. Bevern, who came out one morning to see him at his house in Rondebosch.—Defendant's wife and son were then called, and corroborated defendant's statements with regard to the billiard-table and cushions.

After having heard the arguments of counsel, the Chief Justice remarked that the defence had broken down on every point, and gave judgment for the plaintiffs for the full amount claimed with costs.

SUPREME COURT.

WEDNESDAY, FEBRUARY 11.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. KIVIET MANEL.

Venue—Change of.

On the application of Mr. Giddy, leave was granted to have the accused tried at the Circuit Court, to be held at Beaufort West next month, for contravening section 15, sub-section 2, of Act 19 of 1861, for attempt to murder and for housebreaking.

WRIGHT V. WILLIAMS.

Fraud and misrepresentation—Principal and agent—Principal's authority exceeded by agent. Postponement owing to absence of important witness.

Sir T. Upington, Q.C., for the plaintiff; the defendant in default. This was an action for damages on the ground of the defendant's fraud and misrepresentation.

James Adam Wright, called by Sir T. Upington, Q.C., stated that he was the holder of a mate's certificate. In October, 1889, he was engaged by Captain Williams, the defendant, on behalf of the firm of De Pass, to proceed with him as mate on a sealing expedition. He (the plaintiff) was to receive as payment £5 per month when employed as mate, £4 per month when sealing, 4d. a skin for every seal killed, and 15s. a tun on the oil obtained; these last two items being known in the sealing expeditions as "lay." He noticed that the lay was not referred to in the articles, and in consequence he refused to sign them, but on Captain Williams assuring him that it was not customary to enter the lay on the articles, and that he would receive his lay all right, he signed the articles. On his return from the sealing trip, he put in a claim for £71 10s., which Captain Spence, as De Pass's agent, refused to pay. He then brought an action against De Pass, but only got judgment for £28 10s. Subsequently De Pass tried to sequestrate plaintiff's estate, but the application was dismissed with costs, which had not been paid.

By the Court: Both before and after he signed the articles, Captain Williams told him that it was not customary to enter the lay on the articles. He had served five months, four-and-a-half of which had been spent in sealing.

William Quine stated that he lived in Cape Town, and that he knew the defendant, Captain Williams, by whom he had been asked in October, 1889, to engage a mate. He spoke to plaintiff, and told him what the lay would be. He was present at the shipping office when the articles were signed, and heard Captain Williams tell plaintiff that he would get his lay all right, although it had not been inserted in the articles. The usual lay allowed to a mate was as stated by plaintiff; an ordinary seaman would only receive half-lay. Captain Williams had been up the coast for the past five months, but before he left he told witness that he had received the summons in this case.

Captain William Peterssen stated that he had been formerly captain of the Sea Bird, but that Captain Williams had got command during his illness. It was customary to give a lay to those engaged in sealing. He was still in the service of De Pass, but did not know if he would have to go to sea again.

In answer to the Court: The lay had nothing to do with the shipping office, and was not, as a rule, entered on the articles. If he had engaged Wright, he would only have given him 2d. per skin, and 7s. 6d. per tun of oil. Witness further stated that, although this had been Wright's first sealing trip still he would have been entitled to lay.

Mr. Attorney H. P. du Preez proved that the taxed costs of defendant in the case of Wright v. De Pass amounted to £62 11s. 8d., his own witnesses' being £80 1s. 6d., which had been reduced to £50.

The Chief Justice at this stage intimated that it would be very desirable to have Captain Spence's evidence, and if possible Captain Williams's.

Sir T. Upington, Q.C., concurred, and the case was postponed for further hearing until the arrival of Captain Spence in Cape Town.

SUPREME COURT.

THURSDAY, FEBRUARY 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

CAPE OF GOOD HOPE BANK V. ROBERTSON.

Provisional judgment on two promissory notes, one for £400 and the other for £525, granted with interest from 1st July and 1st August, 1890, respectively.

JACKSON V. CUTTING.

Mr. Searle for plaintiff, and Mr. Juta for defendant.—On the application of Mr. Searle, the matter was allowed to stand over for a week.

COLONIAL GOVERNMENT V. MORGENROOD.

Provisional judgment granted for £27, less £5 15s. 5d.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Arthur Robert Kyffin, Gustav Steffeck (released from sequestration), Albertus Johannes Wilhelmus Pretorius Nel, and Carl Fisher.

THE PETITION OF EDWARD R. A. GIBBON.

On the application of Mr. Graham, an order was granted allowing petitioner to continue his articles of clerkship with Mr. Gus. Trollip, attorney-at-law and notary public, notwithstanding an interval of non-service between 26th March, 1889, and the present date.

TEENGS V. GARLICK.

Evidence—Commission *de bene esse*.

Mr. Schreiner appeared for the applicant, and Mr. Searle for the respondent. This was an application for the issue of a commission to take the evidence of a witness for the plaintiff, which witness, Mr. John William Johnson, is at present residing in Klerksdorp, in the South African Republic.—The Court ordered a commission *de bene esse* to be issued; the plaintiff, however, to use every endeavour to procure the attendance of the witness at the trial, otherwise the expenses of the commission would not be allowed.

IN THE ESTATE OF THE LATE JOHN MILLER.

Trusteeship—Application to be relieved of—Consent of joint trustee.

Mr. Juta presented the petition of Jane Rebecca Miller, praying that she might be relieved of the office of joint executrix and trustee in the said estate. It appeared from an affidavit sworn to by petitioner that her co-executor and joint trustee, the Guardian Insurance and Trust Company of Port Elizabeth, had consented to her relinquishing the trust.

The Chief Justice, in granting the petition as prayed for, remarked that good cause had been shown why the petitioner should be relieved from the trusteeship, the more so as the Guardian Insurance and Trust Company, an institution in which the Court had the greatest confidence, had consented.

PETITION OF ANNA M. MEIRING.

Mr. Graham moved, on behalf of the petitioner, for leave to sue *in forma pauperis*, in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel for his certificate.

IN THE ESTATE OF THE LATE WILLIAM PRETORIUS.

Will—Alienation of landed property prohibited—Quit-rent.

Mr. Schreiner moved for authority to sell the landed property in this estate, in order to satisfy certain claims for quit-rent. It appeared from an affidavit read by counsel that the will of the late William Pretorius contained a clause prohibiting the alienation of one-half of the farm Retreat, in the district of Maclear—the landed property referred to in the application.—Mr. Schreiner, on the authority of Sande, (Omnia Opera, Pars. III,

Cap. I, Secs. 1, 2, 3), contended that the prohibition of the will was null and void inasmuch as there was no person mentioned in whose favour the alienation had been prohibited.

The matter was referred to the Master, information to be given as to the amount of quit-rent due.

DALTON V. QUINE.

Mr. Castens moved for leave to the defendant to sign judgment against the plaintiff for failure to proceed with his action.

As notice had not been served, the matter on the application of counsel was allowed to stand over.

GREENE V. BEVERIDGE.

Mr. Schreiner moved for the issue of a commission to take the evidence of a witness named Briggs, at present residing in Durban, Natal.

Mr. Searle opposed the motion.

The Court ordered the commission to issue, and appointed the Resident Magistrate of Durban commissioner, and in the event of his being unable to accept the office Mr. Attorney Carmichael, the commission not to interfere with the hearing of the case this term.

IN THE ESTATE OF SAMUEL PHILLIPS.

Mr. Maskew moved for authority to the executrix to raise a loan of £150 on mortgage of the landed property in the estate, for the purpose of effecting the necessary repairs and satisfying debts.

Matter referred to the Master and amount to be fixed by him after inquiry.

INSOLVENT ESTATE OF RICHARD H. AUNN.

Mr. Castens applied for an extension of the time in which the trustee is required to file the final accounts by six months.—Leave granted.

INSOLVENT ESTATE OF DONALD D. HOUSTON.

Mr. Graham moved for authority to the trustee and to the Registrar of Deeds to pass transfer to the purchaser of a certain farm called Vlakplaats, situated in the district of Umzimkulu, Griqualand East.

Mr. Justice Buchanan intimated that the matter had come before him in Chambers, but he was under the impression that it was in the form of a process in aid of a judgment of the Resident Magistrate.—The matter was again referred to the learned judge for his consideration.

THE PAARL BANK, IN LIQUIDATION.

Company—Bank in liquidation—Shareholders past and present. Application to place past shareholders on list of contributories refused on the grounds *inter alia* that the liquidators had failed to show that any of the debts owing by the bank had been incurred before such past shareholders had transferred their shares.

Sir Thomas Upington moved, on the petition of the liquidators of the Paarl Bank, for an order to settle the list of contributories, fix the time for the proof of debts, assess the amount of the call, give liquidators power to effect compromises and pay out dividends without first filing accounts, sanction the appointment of an attorney, and fix the liquidators' remuneration.

Mr. Searle appeared for Mr. G. J. Celliers and Mrs. Elizabeth van Niekerk, to object to their names remaining on the list of contributories annexed to the liquidators' report.

Mr. Schreiner said he represented a considerable number of persons and estates, who applied to have their names struck off. Altogether there were 24 applicants.

Sir Thomas Upington proceeded to discuss the question as to whether there was any authority to go behind the registered shareholders at the present time for the purpose of placing any former shareholders on the list.

The Chief Justice: Do I understand that all the opposing shareholders oppose on the ground that they have ceased to be shareholders before the date of the winding-up?

Mr. Searle: Yes, my lord.

The Chief Justice: But the dates at which they ceased to be shareholders vary?

Mr. Searle replied in the affirmative, and added that there were several other grounds.

The Chief Justice: Can you tell me, Sir Thomas, whether the accounts or report show when the debts were contracted in respect of which past shareholders are now sought to be made liable?

Sir Thomas Upington: I have no specific accounts to that effect. What I have is merely on affidavit. What they rely on is, that in certain lists given to the Registrar their names do not appear.

Mr. Justice Buchanan: Wouldn't it also be necessary for you to show that the present shareholders will not be able to pay the debts?

Sir Thomas Upington: It will be my contention that in the circumstances that happened they never ceased to be shareholders at all. The question was (continued counsel), what was the position of persons who were shareholders in unlimited concerns like the Paarl Bank? They must be looked

upon in the light of partners in the concern, and the liability which would attach to a former partner would attach to anyone of the former shareholders. Had any persons on the list, by conduct of theirs or by anything that had happened, shown that they had released themselves from the position of partnership in which they were placed? He submitted that the true state of the law would be that if a person who was in the position of a partner retired from the firm, without public notice to any of the creditors of the firm of his retirement, he would still be considered in the light of a partner, not only for the debts for which he would have been liable up to the date when he secretly left the firm, but for all debts of the partnership subsequently incurred, until he did give public notice.

The Chief Justice, remarking upon the mode in which notice was to be given, said it was quite a modern custom to advertise the dissolution of a partnership in the public newspapers. Where was the notice to be given? If in the *Government Gazette* the chances were that nobody would see it.

Sir Thomas Upington submitted that the proper machinery for giving notice was through the *Government Gazette*, just as under the English law the *London Gazette* was the legal medium. As regarded the contention that the bank had been previously dissolved, this was not in accordance with the facts, which showed that it had never absolutely expired, and he contended that the liability continued until the actual winding-up. Counsel then read a brief affidavit by the liquidators, to the effect that a large amount of the debts was contracted when the present applicants were shareholders.

Mr. Searle then addressed the Court on behalf of his clients, arguing that as the bank's directors were compelled to supply a list of shareholders and other information to the Deeds Office, that was a sufficient means of putting before the public any alteration in the constitution of the bank, or its list of shareholders; further, that there was not sufficient to show that the debts were contracted at a time when his clients were shareholders. He relied also upon the argument that they were barred from liability by prescription.

Mr. Schreiner submitted that the Court could not order a late shareholder to pay the same debt concurrently with a present shareholder. If he had originally held five shares and he had sold them to Baron Rothschild the liquidators would naturally come on the Baron for the amount of his liability, but could they also come upon him (Mr. Schreiner) for a concurrent payment of the same debt? Proceeding, counsel briefly referred to the applicants he represented. One whose estate he appeared for had been off the list for thirty-six years, and was dead into the bargain. In fact, he represented a number of estates of deceased shareholders.

The Chief Justice, in giving judgment, said the questions involved in the application were of great importance, and he would like to give a formal judgment, but at the same time he might state they had already decided that the applicatien to strike out the names of all past shareholders should be acceded to on the ground that it was wholly premature on the part of the liquidators to place the names of past shareholders, who had *bona fide* transferred their shares, on the list at all. In the case of "The Cape Commercial Bank v. Hofmeyr" the Court said that until it appeared that the contributories on the list were unable to meet the liabilities of the bank they could not entertain any application for adding to the list the names of shareholders whose shares had been *bona fide* transferred before the date of the winding-up. In the present case there was no clear evidence to show that the contributories on the list A were unable to meet the liabilities of the bank. There was no doubt a statement in the report which suggested that it was possible the present shareholders would not be able to pay, but it did not go further. He was also reminded that there was a further affidavit to the effect that the liquidators had come to the conclusion that after all present shareholders had been excussed there would be a deficiency of £57,900, but he thought they should go further, and that there should be an account framed from which it would clearly appear that this would be the result. And, moreover, before any past shareholder could be sued, it must be clearly shown that the shareholder to whom he had transferred his shares was unable to pay. There had been no excussion, as in the case of Hofmeyr. But, supposing it was proved that the contributories were unable to meet the liabilities, the further question arose whether any person who ceased to be a shareholder before the winding-up, ceased to be a shareholder at a time when any of the existing debts of the company were owing. In his opinion no shareholder could be held liable for any debts incurred after he ceased to be a shareholder. In his opinion, also, the notice in the Registrar of Deeds' office stood in the place of a notice in the *Government Gazette* or the public newspapers, and that it was sufficient notice to persons dealing with the company as to who were shareholders in it. The application to strike out the names of all those persons who had transferred their shares before the winding-up came into operation must be granted. At the same time, it was understood that this would not bar the liquidators from hereafter placing their names on the list, in case, for instance, it could be proved that debts were owing by the bank at the time they ceased to be shareholders. It was no doubt quite true

that the liquidators represented the shareholders, but it could not be lost sight of that for certain purposes they also represented the creditors, and as at present advised he was inclined to think that the creditors' claims against individual shareholders were taken away by the Act, and that they could only assert their claims through the medium of the liquidators. If this were correct then, under the Act of 1861 creditors had certain rights against shareholders, and the only way the liquidators could assert the creditors' rights was by placing the shareholders on the list of contributories. Accounts must, however, be framed to show that at the time one ceased to be a shareholder certain debts were owing, in respect of which creditors could sue him. In other words, that no person could be placed on the list of contributories, even on list B, unless it could be shown that if the company had not been wound up, there were creditors now in existence who could sue him on the list.

Sir Thomas Upington remarked that he had advised the liquidators to withdraw list B for the present.

The Court then fixed the 31st March for the proof of debts. Place of proof, the office of the Paarl Bank. The mode of proof to be the same as in the case of the Union Bank. The amount of the first call to be £250 per share, with interest at 6 per cent. from date of call. The dividend not to be less than 1s. in the £. The appointment of Mr. De Villiers as attorney was sanctioned. The remuneration of the liquidators to be a matter for after consideration. The costs of only four sets of respondents would be allowed.

Postea (February 16) the following formal judgment was delivered.

The Chief Justice said: There are three classes of past shareholders in the Paarl Bank who now apply to have their names struck out of the list of contributories. The first class consists of the representatives of deceased shareholders, the second of shareholders who ceased to be such before the last renewal of the period of the bank's continuance, and the third of shareholders, not falling within either of the first two classes, who had ceased to be shareholders before the order for winding up the bank was made. All the applicants, however, are either shareholders or representatives of shareholders, whose shares had, before the order, been actually transferred to and registered in the names of the present shareholders. In the view which I take of the case all the applications may be considered together. The first principles independently of statute which should guide the Court in deciding the respective rights of creditors and shareholders of joint-stock companies must be looked for in the common law relating to partnership, and may be traced farther back to the common law relating to mandate or agency. A partner, who is known to be such to creditors dealing with his co-partners, is liable for debts incurred by his co-partners, in the name and on behalf of the partnership and within the scope of its business. For the purpose of carrying on the business his co-partners are his agents, but upon the dissolution of the partnership the agency would also cease to exist except for the purpose of liquidating the affairs of the partnership. It follows that fresh obligations incurred by his co-partners after the dissolution ought not to bind him except in cases where such a rule would lead to a breach of faith with creditors. Such a case would certainly arise where a creditor has given credit to a firm upon the faith of a former partner still being a member and in ignorance of his having ceased to be such. Voet (42, 17, 25), in discussing the question whether the renunciation of a partnership by one partner should be effected by a public or private intimation, draws a distinction between the co-partners and creditors who have dealt with the partnership. As to the former, he says that a private intimation is sufficient, but as to the latter, he maintains that their rights cannot be affected by a private dissolution. As creditors, he says, who have contracted with one of the partners and given credit to the partnership, they are entitled to receive notice, either by a public advertisement or by a private intimation, that an end has been put to the partnership. The notice required to be given to old customers I take to be a special one, for he adds that it is required in order to prevent creditors from being deceived through their ignorance of the dissolution, and that a creditor who is not ignorant of the dissolution cannot take advantage of the absence of a public advertisement. In the case of persons who had not dealt with the partnership before the retirement of a partner, a public notification of such retirement would seem to have been sufficient. According to Pothier ("Partnership," sec. 156), if traders or artisans who were accustomed to furnish supplies to the partnership have *bona fide*, after the dissolution of the partnership, of which they were ignorant, continued to furnish these supplies to one of the former partners, on account of the partnership, all the former partners or their heirs, will be bound. . . . Suppose, for instance, they were ignorant of the death of one of the partners, which was not yet known in the place where they furnished the supplies, or were ignorant of the renunciation of the partnership made by one of the partners; notice of the renunciation not having been given to them, and not having been made public." From these and other authorities it seems clear that in order to relieve a person from liability for fresh obligations incurred by the firm to old customers after he has retired from it, notice of his having so retired must be

proved to have been given to the customer to whom the fresh obligation was incurred. Pothier further says: "When the traders or artisans have furnished the supplies after the expiration of the time for which the partnership had been contracted, they cannot be heard to allege that they were ignorant of its dissolution, because those who have business with persons who are in partnership ought to inform themselves of the terms of the partnership." "This," he adds, "is the opinion of Gomez (Var. Res., 2, 5, 6)," the same author and the same passage cited by Voet in support of the views I have quoted from him. The doctrine thus laid down seems to follow, from the ordinary rule in regard to agents, that persons dealing with them ought to acquaint themselves with the nature and extent of their authority, and is subject to the same qualifications as the rule. Until the year 1861 the liability of all joint-stock companies, except a few incorporated by special statute, was unlimited. In regard to creditors dealing with such companies, the shareholders were to all intents and purposes partners, and were subject to the common law relating to partnership. In 1861 the first Joint-stock Companies' Limited Liability Act was passed, by which members of all joint-stock companies, except banking companies, were enabled to limit their liability for the debts and engagements of such companies. The term "joint-stock company" was defined as meaning, for the purposes of that Act, "every partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the partners, and also every partnership which at its formation, or by subsequent admission, shall consist of more than twenty-five members." The 12th section provides that execution shall not issue against any shareholder until after the company has been excussed, and that no shareholder shall be liable to pay in satisfaction of such execution a greater sum than shall be equal to the portion of his shares not then paid up. The 13th section provides that if any shareholder shall have been excussed, execution may issue against any former holder of the shares held by such shareholder for such amount as he shall have failed to pay in satisfaction of the execution, not exceeding, however, the amount which such former holder would have been liable for if he had been the present holder of the shares. Then follows this important proviso which considerably modifies the common law as already explained: "Provided, also, that in the case of execution against any former shareholder, such shareholder shall have been a shareholder at the time when the contract or engagement for which the judgment, decree, or order may have been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained." Thus far the provisions of the 13th section, as amended by Act No. 11 of 1879, are applicable to all companies, including banking companies with limited as well as unlimited liability. But the further provisions of the section, as so amended, relating to banking and other companies with limited liability, differ from those relating to banking companies with unlimited liability. As to the former, no execution, even to the limited extent already mentioned, can issue against a former shareholder after the expiration of two years next after the return of the transfer of the shares has been made to the Registrar of Deeds. As to the latter, that is, banking companies with unlimited liability, it is not sufficient that two years had expired from the time when the share had been transferred, but the former shareholder must also have published certain notices in the newspapers that he had ceased to be a shareholder in such banking company. The past shareholder in a banking company with limited liability is, of course, not liable for more than the unpaid portion of his shares. As to shareholders in a banking company with unlimited liability, the last proviso of the section provides that "every such shareholder shall, as such former shareholder, be liable to the same amount as if this Act had never been passed." The language of this proviso is certainly most unfortunate, but it clearly could not have been intended to neutralise everything that had been enacted immediately before in regard to banking companies with unlimited liability, which are the only kind of banking companies to which that section (before it was amended by the Act of 1879) could possibly refer. Its object was to make it perfectly clear that, although former shareholder of such banking companies are allowed to participate in the benefits conferred by the section, they shall not on that account be considered as having been members of a limited liability company. In regard to debts incurred and engagements entered into before they ceased to be shareholders their liability is unlimited, and not, as in the case of former shareholders of banking companies with limited liability, limited to the amount of the unpaid portion of their shares. But even such debts and engagements former shareholders are, as I have just pointed out, relieved from, if in the case of banking companies with limited liability two years have elapsed since the return of the transfer of the shares, and if, in the case of banking companies with unlimited liability, two years have elapsed since the transfer and public notice of such transfer has been given. As to debts and engagements incurred after transfer no liability attaches to former shareholders of banking companies, whether their liability be limited or unlimited. In this respect such share-

holders are placed upon the same footing as retired partners who have given due notice by public advertisement and by special notice to their customers of their retirement from the partnership. And in order to prevent any possible breach of faith with customers of joint-stock banks by giving them the fullest information as to the concerns of such banks, the 16th section of Act No. 19 of 1865 requires every such bank to file annually with the Registrar of Deeds a copy of the instrument under which it is constituted, together with a list of the names of the shareholders up to the 31st December preceding. In 1868 the Winding-up Act was passed. The object of that Act was to provide efficient machinery for winding up, under the supervision of the Court, not only companies which are unable to pay their debts, but also those which the Court may on other grounds deem it to be just and equitable that they should be wound up. As regards insolvent joint-stock companies they could, before the Act, be wound up under the Insolvent Ordinance, but as the sequestration of the estates of such companies would involve great difficulties where there were many shareholders to deal with, it was deemed advisable to provide a simpler machinery for winding up such companies or any partnerships consisting of more than seven members. The Act is based upon the English Act of 1862, but omits a great many of its provisions, especially those relating to the liability of past shareholders to be placed upon the lists of contributories. This omission was intentional, and the nature and extent of their liability must therefore be sought for in our own common law as modified by our own statutes. For the purpose of conducting the proceedings in winding up a company the Court may appoint one or more liquidators, and their duties are performed under the immediate control and supervision of the Court. They have the powers of a *curator bonis* under the old law, together with such further powers as under the Act they may be permitted by the Court to exercise. On behalf of some of the applicants it has been contended that, whatever rights creditors of the Paarl Bank may have against former shareholders, the liquidators have no business to assist them in the assertion of those rights. This contention involves the assumption that creditors have the right, after a company has been ordered to be wound up, to assert their rights, in their own names, against shareholders, whether past or present—an assumption which is entirely at variance with the whole scope and object of the Winding-up Act. It is inconsistent also with the common law, which, after the appointment of a *curator bonis*, takes away the rights of creditors to sue the person or estate which he represents, and throws upon him the duty of collecting all the assets, suing for them when withheld, and distributing them among the creditors. So large were the powers of a *curator bonis* that, according to Voet (42, 7, 6), he could, although representing the estate of the debtor, also represent the creditors in an action to recover articles pledged to such creditors by the debtor which had improperly come into the possession of third parties, and he might even (Voet, 42, 7, 7) claim from a creditor who had possession of a thing pledged delivery of the thing for the purpose of realisation, reserving of course to such creditor his right of preference in respect of the proceeds. In the case of "Liquidators of Cape Commercial Bank v. Hofmeyr" (2, Juta, 365), the Court by no means intended to lay down that the liquidators only represented the company. A past shareholder had been placed upon the list of contributories without proof that the existing shareholders would not be able to make good the deficiency, and the Court held that the liquidators should give effect to the trust deed releasing past shareholders as between them and the continuing shareholders. It was distinctly admitted in the judgment that for certain purposes the liquidators must be taken to represent the creditors, and one of those purposes is the recovery from persons liable to contribute towards the payment of the debts the amounts owing to such creditors. The list of contributories is settled by the Court upon the recommendation of the liquidators, and the only question in each case is whether the person placed upon the list by the liquidators is bound by law to contribute to the payment of the debts of the company. In the present case the liquidators have placed upon the list the names of the applicants, and they have made the statement, in their report and by affidavit, that the shareholders registered as such at the date of the winding-up will be unable to meet the full amount of the deficiency. They have omitted, however, to state, or to frame an account shewing, that any of the debts owing by the bank had been incurred before the applicants' shares were respectively transferred to the present shareholders. This omission is, in my opinion, fatal. A shareholder who would not now be liable as such to any creditor, in case the bank had never been placed under the Winding-up Act, cannot be made liable at the suit of the liquidators. None of the applicants would have been liable to creditors in respect of debts incurred by the bank after the applicants respectively ceased to be shareholders, and, in the absence of any account showing when the debts owing by the bank were incurred, the applicants are entitled to have their names removed from the list of contributories.

WEBSTER V. SOLOMON AND ANOTHER.

On the application of Mr. Searle, the rule *nisi* interdicting the removal or sale of certain furniture and goods attached to satisfy a judg-

ment of the Resident Magistrate of Cape Town, pending an action to be brought by applicant for recovery of rent, was made absolute.

IN THE ESTATE OF THE LATE GEORGE E. ROSS.

Mr. Searle moved for an order requiring the widow of the deceased to deliver up to the executor of the estate the deeds of transfer and other documents in her possession relating to the assets therein. Mr. Searle informed the Court that Mrs. Ross had this morning, through her attorney, expressed her willingness to give up the required documents. Such being the case he had merely to ask for costs, which were granted.

GROOM V. THE BECHUANALAND EXPLORATION COMPANY.

Sir T. Upington, Q.C., with whom was Mr. Schreiner, applied for an order postponing the trial of a pending action until such time as the defendants shall be enabled to procure the attendance of Mr. Hermann, a necessary witness.

Mr. Searle opposed the motion.

The Court made no order with regard to Hermann, but directed that the evidence of Groom and White should be taken at the trial, and if Hermann did not arrive in time for the trial an order would be then made.

THE LIQUIDATORS OF THE UNION BANK V. WATSON'S ESTATE.

Mr. Schreiner moved, on behalf of the liquidators, for leave to place on the list of contributories the heirs of the said estate to the extent that they had derived benefit therefrom, and for direction as to service of notice thereof on the said heirs. It appeared from the statement of counsel that Mr. Watson had died in 1884, and at the time of his death he was the registered holder of 50 shares in the Union Bank. His heirs, who were ten in number, had each received £4,818 in the final distribution of the estate, and it was now asked that they should be placed on the list of contributories.

Mr. Searle, who appeared for the heirs, opposed the motion.

The Court granted a rule *nisi* calling upon the heirs to show cause why they should not be placed on the list as contributories. Copy of the rule to be served on Messrs. Van Zyl & Buissinne, and to be made returnable on the 15th of May.

PARKER V. HOPKINS.

Mr. Schreiner moved on behalf of the applicant, a niece of the respondent, for a rule *nisi* calling upon the latter to show cause why she should not be declared of unsound mind, and incapable of managing her own affairs.

The Court granted the rule, and appointed Mr. Castens *curator ad litem*.

IN THE INSOLVENT ESTATE OF PETER JOSEPH OATES.

On the application of Mr. Juta, Mr. Henry Flint East was appointed provisional trustee, with permission to carry on the business of the Crown Hotel, Claremont, formerly conducted by the insolvent.

SUPREME COURT.

MONDAY, FEBRUARY 16.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

MATHEW V. PENTZ AND THE COLONIAL GOVERNMENT.

Diamond—Right to possession—Action for recovery.

Mr. Searle and Mr. Graham appeared for the plaintiff.

Mr. Schreiner and Mr. Jones for the defendant Pentz, and Mr. Giddy watched the proceedings on behalf of the Colonial Government, and intimated that the Government had withdrawn its claim and merely held the diamond subject to the decision of the Court in this case.

This was an action brought by Mrs. Mathew, wife of Alexander Mathew, of Johannesburg, against the Colonial Government and Nicholas William Pentz, of Warrenton, for the delivery of a diamond which it was alleged was the property of the plaintiff, or, in the alternative, payment of £2,000, alleged to be its value. The declaration alleged that about the year 1862 the plaintiff resided on her father's farm in the division of Swellendam, where she found a certain stone, of the nature of which she was then ignorant, and about 1871 she handed it over to defendant Pentz for the purpose of making inquiry as to its quality. In the year 1889 she heard that the stone was a diamond, and that Pentz had given it to the Detective Department in Kimberley, whereupon she made a demand for it.

The plea of the defendant Pentz was to the effect that about 1870 Bessie Myburgh, now Mrs. Dreyer, sister of the plaintiff, gave him the stone, which was supposed to be a crystal, as a keepsake; that when he was at Warrenton in 1889, an expert

in diamonds identified the stone as a diamond, and the defendant accordingly handed it over to the Detective Department. He then brought an action against the department, and last November the Supreme Court gave judgment in his favour, awarding him possession of the diamond, but appointing the Government its bailee, until security could be given by the plaintiff (Mrs. Mathew) for the costs of the present action.

The Chief Justice: Has Mrs. Mathew seen the diamond?

Mr. Searle: I understand a sight of it has been refused.

Then how can she recognise it?—There is other evidence.

Then all you can say is that you had a diamond?—Yes, we say we handed a large crystal to Pentz.

Mr. Giddy here remarked that the Colonial Government made no claim for the diamond, and had withdrawn from the proceedings, except so far as it was concerned as bailee of the stone.

Thomas Woodville Harker, chief clerk of the Detective Department, Kimberley, called by Mr. Searle, stated that in October, 1889, Pentz came to the office with a diamond which he told witness he had received about thirteen years before from Miss Bessie Myburgh, at Heidelberg, and that Miss Bessie Myburgh was now a Mrs. Dryer. Pentz further stated that he did not know it was a diamond, and had only kept it as a keepsake, together with a small peacock's feather, and a letter which he had received at the same time. Witness saw Mrs. Dreyer early in November at Bredasdorp, and in consequence of what she told him, Mr. Pentz was brought to that place. They saw Mrs. Dreyer, who said that she had never seen the stone before. Pentz tried to refresh her memory and mentioned the feather and the letter, which letter he said he had torn up. Mrs. Dreyer said she did not remember either the stone or the letter. Subsequently a telegram was received from Mrs. Mathew claiming the diamond as hers.

The Chief Justice: Has the plaintiff seen the stone?

Witness: It was not placed singly before her.

You did show it to her?—Oh yes! I put it in a box with a number of imitation diamonds.

And could she recognise it as her diamond?—No, she could not identify it.

Cross-examined by Mr. Schreiner: The diamond was an 87-carat one, and not an 18-carat stone, as alluded to by Mrs. Mathew in a telegram to the Detective Department, in which she also stated that she was coming to claim it. There were paragraphs in several newspapers concerning the case before it came on, and in the Johannesburg *Star* was an intimation, soon after Pentz gave the stone to the department, that it was in their custody.

You showed Mrs. Mathew the diamond amongst others and she could not recognise it?—She did not recognise it.

Have you anything—any diamonds—which you could place side by side with the stone in dispute, in order to test her knowledge of it?—I have not; but there may be spurious diamonds in the Attorney-General's office. (Great laughter.) Left there as curios, though. (Renewed laughter.)

Didn't you find from the different people you made inquiries of that Mr. Pentz bore an honest reputation?

Mr. Searle: I object to that; I don't know what it means.

Mr. Schreiner: Don't you know what an honest reputation is? (Laughter.)

The Chief Justice overruled the question as irrelevant, and this concluded the evidence of the witness.

Mr. Tilman Roux Myburgh, Meltkamer, Bredasdorp, brother of Mrs. Dreyer and Mrs. Mathew, referred to the visit of Mr. Harker to the farm with the stone in dispute. Witness could not at first believe it was a diamond.

Mr. Searle: Had you seen the stone before?

Witness: I saw such a stone in my father's desk years ago.

Is it the same stone?—The same shape, but it is a little brighter than when I saw it.

Do you remember the stone for many years?—I knew it was in the desk for a long time.

Was it considered to be a diamond?—I thought it was only a crystal or white stone. There was also a green stone in the desk of a fibrous nature.

Cross-examined by Mr. Schreiner: I believe it is the same stone as was in my father's desk.

You remember that there was a large find of crystals on an adjoining farm to your father's?—Yes; but none were so big as this.

Mr. Searle then proposed to show witness the diamond, which was done, the stone being carefully kept from the sight of Mrs. Mathew.

Mr. Searle: Is that the stone you saw Mr. Harker had with him?—I believe it is the stone from its shape and a little mark on it.

Had the stone in your father's desk any mark upon it?—There was a little flaw in it, and, judging from the shape, I should say that is the same.

Mrs. Hester Hannah Mathew, born in 1852, stated that she married in 1871.

Mr. Searle: Do you remember in November, 1889, seeing a paragraph in the *Star*?

Witness: My husband read it to me.

The Chief Justice: It is headed "Another South African Romance."

Witness (continuing) said she made an affidavit in consequence of what she heard, and afterwards went to Kimberley. She picked up the stone when she was between eight and ten years of age. She found it near the cattle kraal, on their farm near

Heidelberg, and took it to her father, who locked it up in his desk, along with a piece of asbestos. It was always known as "Hessie haar Kristal." Witness was at school at Durbanville, and at Rondebosch. Between 1867 and 1869 she gave Pentz the stone. He was postmaster at Heidelberg.

How did you get it to give him?—I asked my father for it, as Pentz had promised to have it examined. They had often talked of the stone.

The Chief Justice here pointed out that there was some discrepancy in the plaintiff's dates.

Mr. Searle said she had only arrived in town this morning from Johannesburg, but considering the length of time that had elapsed she was as near the date as possible.

Witness (continuing) said she met Mr. Mathew as she was going home from Rondebosch in 1869, and they were engaged a year later. Her father died in 1877. Since her marriage she had lived at Bredasdorp, Beaufort West, Malmani, and Johannesburg.

Mr. Searle: Have you ever seen Pentz since?

Witness: I last saw him during the Basuto war. I came down to Heidelberg, where Pentz had married.

Did you ever speak to Pentz about the stone afterwards?—No, never. I clean forgot all about it until I saw the news in the *Star*.

Were the circumstances recalled as soon as you saw it in the *Star*?—At once.

Can you describe us the stone. How large was it?—I cannot describe anything very accurately, having parted with it so long ago.

The Chief Justice: Is it as long as the joint of your thumb?

Witness: Something like that, but I could not say definitely; besides, I am colour blind.

Mr. Searle: Was it square or round?

Witness: It was of irregular shape.

What colour was it?—It was white, but not pure white.

Would you know the stone now if you saw it?—I might recognise it, but I would not be positive.

Look at this crystal now, and tell us if it is the stone.—The stone was then handed to the plaintiff, who at once exclaimed, "Oh yes, that is it."

You think that is it?—I think it is it. It is a difficult stone to describe.

Cross-examined by Mr. Schreiner: You see the stone now?

Witness: Yes.

Mr. Harker showed you a lot of stones, didn't he, in an oblong box?—Yes.

Was that stone in your hand among them?—I don't know.

Did you look among the stones?—I didn't take particular notice.

You knew one of them was the diamond you laid claim to?—No, Mr. Harker didn't tell me it was there,

Didn't he ask you to pick out the stone?—No, he didn't. He asked me if I could identify it, and I said I could not undertake to do so, and then he said he would show me a few stones, and he did.

Did he not ask you whether the diamond was amongst them?—No.

You never were on friendly terms with Pentz?—No.

You never wrote him affectionate letters?—I should think not.

Mr. Justice Smith elicited from the witness that she never mentioned the matter to her husband, because it never occurred to her memory at all, and she was a bad hand at remembering dates.

Mrs. Elizabeth Catherine Dreyer, born in 1855, and married in 1877, six weeks after her father's death, who was also a witness in the recent action by Pentz against the Government, said the stone was generally spoken of as "Hessie haar Kristal." She considered the stone produced as the one which her father kept in his desk. It was the same stone that was produced in the recent case. Pentz alleged that she (witness) gave it to him as a keepsake, together with a peacock's feather and a letter, but he destroyed the letter only a few months before he went to Warrenton. Witness was confident she never gave him anything, and she denied that she wrote a letter (produced).

Cross-examined: Witness was taken by Mr. Schreiner over a great part of her former evidence, and adhered in the main to her statement. She was never too fond of Pentz, who about 1870 was engaged to Miss Botha.

Mr. Schreiner: About that time, when Pentz was twenty years old, he was considered a gay young fellow?

Witness: I don't know.

Didn't you know that of him?—No.

Was he a good young man, who still manages to live?—Witness made no reply.

The Chief Justice: What do you mean by "a gay young man"?

Mr. Justice Smith: Perhaps a gay Lothario. (Laughter.)

Mr. Schreiner: I do not mean anything wrong.

Mr. Justice Buchanan: You mean a ladies' man? (Renewed laughter.)

Mr. Schreiner: He was a great admirer of the ladies. (Laughter.) Was there, Mrs. Dreyer, nothing of sweethearts' innocent little endearments between you and Mr. Pentz?

Witness: Nothing of the kind.

How is it, then, that he comes to have couple of photographs of you?—He might have got them somewhere else.

There were plenty of your photographs in the district, weren't there?

Witness: Yes. (Great laughter.)

Mr. Schreiner: And Mr. Pentz seems to have got his share. (Renewed laughter).

The Chief Justice: They are hardly photographs she would have sent to her lover. They do not do her justice at all. (More laughter).

Mr. Searle: Were they taken by a local artist?

Witness: I think at Heidelberg.

Mr. Andreas Johannes Dreyer, husband of Mrs. Dreyer, detailed the conversation which took place between his wife and Mr. Pentz at Bredasdorp, when Mr. Harker was also present. His wife denied having ever given Pentz anything, and the latter asked her to admit that she had given him the stone, and he would give her £100.

Cross-examined: He distinctly heard Pentz offer the money.

Mrs. Johanna Jacoba Myburgh, aged seventy-one, widow of Tilman Roux Myburgh, of Heidelberg, stated that her daughter Hessie was about ten years old when she brought a stone into the house which she said she had found outside the house. There was never another stone so large found on the farm. The stone produced was very like it. Her opinion was confirmed by the fact of a little scratch she noticed on it, but it was twenty years since she saw it.

Cross-examined by Mr. Schreiner: Was Pentz engaged to your daughter Bessie?

Witness: No, I think not.

Your daughter was an attractive girl, and there were plenty of young fellows?—Oh, yes; they came so many. (Laughter.)

And Pentz was a fine, well-set-up young fellow?—He came there like a friend, and never said anything specially.

Never asked that he might be engaged to her?—Never. Continuing, witness said she heard about 1870 that an adjoining farm was supposed to be diamondiferous.

Mr. Schreiner here quoted a paragraph from the *George Advertiser* of November, 1870, from which it appeared that en ground adjoining the Myburghs' farm a small diamond about the size of a pin's head had been picked up. The paragraph concluded with the remark that if gold and diamonds were found in the country things would begin to look cheerful. (Laughter.)

This closed the case for the plaintiff.

For the defence,

Mr. Nicholas Willem Pentz, defendant, stated that he was plaintiff in the late action against the Detective Department to recover the diamond. He knew the Myburghs from youth. In 1868 he was at school at the Paarl, thence he went to Heidelberg, and subsequently became the postmaster there. He knew Miss Bessie Myburgh (Mrs. Dreyer) well. He never saw the stone at the farm, and he never asked for it. Miss Myburgh gave him the letter (produced), together with the diamond and peacock feather as keepsakes. After knocking about the country for some years witness got to Warrenton, when on the advice of others he gave the stone to the detectives. At the interview with Mrs. Pentz he stated that he had destroyed the letter, but subsequently he found it. He never offered Mrs. Dreyer £100 if she would admit that she had given it. His wife found the letter, and she advised him so by telegraph whilst he was at Bredasdorp. The telegram went to Kimberley. Some time after Miss Bessie Myburgh gave him the stone he reminded her of it, but she made no comment upon it. The photographs produced were given him by her.

How old were you when you went to Heidelberg?—About twenty.

And you knew a good many young ladies in the place?—Oh, yes; many.

Cross-examined by Mr. Searle: On the 7th of December last he made an affidavit to the effect that he had destroyed the letter.

Mr. Searle: Now that telegram is dated November 24?

Witness: I didn't read the telegram until after I had made my affidavit. I thought my wife was alluding to some other Betty.

Cross-examination continued: He could not tell why he did not throw the stone and feather away as well (as he supposed he had done) as the letter. He had often kissed Miss Betty, and there was certainly love-making between them. He had kissed her—(laughter)—and could not account for having said at the last trial that there was no love-making, beyond saying that his evidence had been misunderstood.

Mr. Searle: What is your idea of love-making? Isn't kissing part of it?

Witness: I should think so. Continuing, he said he could not produce any other letters from Miss Myburgh. He could not give any reasons for the presents, because he was not immediately leaving Heidelberg. Never remembered Miss Hester Myburgh asking him to see what the stone was.

Re-examined: He had since found a letter from Miss Munnik in a cash-box wherein was the letter of Miss Bessie Myburgh.

The Chief Justice said he supposed the purpose of putting Miss Munnik's letter in was to show that there was no resemblance between the handwriting of the two letters. After examining them he said that there certainly was no resemblance.

Mr. Harker (re-called) stated that, in his presence, the defendant in a friendly way offered £200 to Mrs. Dreyer, but she said she would not take a false oath for £1,000. The offer was not a serious one, and witness did not look upon it as a bribe. When he showed Mrs. Mathew a box of diamonds, with the one in dispute amongst them, she pleaded colour blindness and defective memory. She picked up several, and had the actual diamond in her hand, as she had others, but she did not actually identify it.

Mrs. Dolina Berthrina Pentz (born Botha), aged 33, wife of the defendant, said that before her marriage she frequently saw defendant kiss Miss Betty Myburgh. After witness was married he showed her the diamond, which was always kept in a cashbox. After her husband had gone to Bredasdorp she found in the bottom of another cashbox the letter from Miss Myburgh, containing the feather. Very often their child used to play with the stone. They knew nothing of its value.

Cross-examined: She had never been asked to search for Miss Myburgh's letter and sent the telegram on her own responsibility. She did not send the letter for two months after telegraphing.

This concluded the evidence.

SUPREME COURT.

TUESDAY, FEBRUARY 17.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

MATHEW v. PENTZ AND THE COLONIAL GOVERNMENT.

[SECOND DAY.]

Mr. Searle and Mr. Graham for the plaintiff.

Mr. Schreiner and Mr. Jones for the defendant.

Mr. Giddy watched the proceedings on behalf of the Colonial Government.

Mr. Searle, in opening his argument, remarked that there had been very great conflict of testimony. There were, however, two points which it would be the duty of the Court to consider: (1) Was the diamond claimed by plaintiff the crystal found on Myburgh's farm twenty years ago? And (2) if that were so, whose story was to be believed as to the way in which the defendant had become possessed of it?

Mr. Justice Smith: I suppose, Mr. Searle, you base your contention on the fact that the diamond was found on the Myburghs' farm?

Mr. Searle: Yes; all the witnesses agree on that point.

Mr. Justice Smith: Because it appears to me to be inconceivable how a man like Pentz could have kept a diamond in his possession for so long a time without ascertaining its value.

Mr. Searle, continuing his argument, maintained that the diamond had been sufficiently identified, considering the long period that had elapsed since many of the witnesses had seen it. He further contended that Mrs. Mathew's account of how she had given the stone to Pentz was much more worthy of credence than the account given by the defendant.

Mr. Schreiner put in the order of Court in the case of Pentz v. The Attorney-General, tried in November last, and remarked that the Court would have to take into consideration, in weighing the evidence given in this case, the action of the Colonial Government with regard to the defendant, which virtually amounted to a recognition of the *bona fides* of his claim. The onus was on the plaintiff of proving that she had a better claim to the diamond than Mr. Pentz, and this claim she had wholly failed to establish. Counsel then commented upon the ease with which the plaintiff appeared to recognise the diamond when it was shown to her in the witness-box, although she had failed to identify it a short time before when it had been shown to her by Mr. Harker. Continuing, Mr. Schreiner remarked that, no doubt, both the plaintiff and her sister had picked up many crystals on their father's farm from time to time, and when she heard of the paragraph in the *Star*, and the wish being father to the thought, she advanced a claim to the diamond, which she had failed to establish.

The Chief Justice remarked that the first large diamond had been found at Hope Town.

Mr. Justice Buchanan: A voracious ostrich might have swallowed the diamond.

Mr. Schreiner: I do not remember ostriches so early as 1870 in the district in which the parties lived, but it was a well-known fact that travellers coming from the interior frequently brought down pretty stones with them. Had the ostrich scare, or rather mania, or boom—(laughter)—been on at that time it might offer a possible explanation.

Mr. Justice Buchanan: It would have been difficult for an ostrich born in the Colony to have found a diamond on the banks of the Orange River.

Counsel then remarked that the apparent discrepancy between the defendant's testimony in the previous case and in the present with regard to his love-making could be easily explained. Mr. Pentz had evidently peculiar views on the subject of love-making. He perhaps thought that it involved serious intention, and he appeared to imagine that where there had been no affection there could be no love-making. There was abundant evidence that he had kissed Miss Myburgh, but kissing to him appeared to be like shaking hands to other people. His love may have been of a higher standard, but he ought not to be disbelieved because he entertained rude and bucolic views of what was generally regarded as love-making. With regard to the discrepancies in Miss Myburgh's letter, counsel submitted that when young ladies wrote love letters they were not very particular as to the "context." The alteration was in the same handwriting as the letter.

The Chief Justice: I should have thought there would have also been a postscript.—Counsel, in

conclusion maintained that the plaintiff had failed to establish her case and that the defendant was entitled to a verdict.

The Chief Justice, without calling upon Mr. Searle to reply, delivered the following judgment: In the previous action brought by Pentz against the Government, the only question that arose was as to which of the two had the better right to the stone. Pentz had possession, and inasmuch as the Government did not prosecute in that case, and did not profess its willingness to prosecute, the Court held that as between him and the Government he was entitled to the stone. The question which we have now to decide is whether the plaintiff, Mrs. Mathew, is entitled to the stone as against Pentz. I quite agree with Mr. Schreiner that we are bound to take it that the Government had no ground to prosecute Pentz at all, and that he came into possession of the stone in a perfectly innocent manner. The difficulties which are involved in this case I think are greatly diminished by the fact that it is common cause between plaintiff and defendant that this diamond was not in the year 1890 found at Kimberley or the river diggings, but that it had been in the possession of the defendant for a long time before. It is common cause also that this diamond, whether it originally came from the Diamond-fields or not, did somewhere about 1870 come from the farm at Heidelberg. It is quite possible that this stone, like so many other diamonds found in the Colony, might have been brought into the Colony by some traveller or trader, who did not know its value, and who simply threw it away, and that in this way it was found by someone on the farm. I am quite satisfied that Mrs. Mathew, the plaintiff in this suit, did give Pentz the crystal, or pebble which she thought to be a crystal, and that she did so being anxious to discover whether it was a diamond or not. As soon as her husband read the paragraph in the *Star*, she, without delay, through her husband, telegraphed to the Kimberley Detective Department claiming the diamond. Now unless there had been something of the kind between her and Pentz, I am satisfied she would not on the spur of the moment have induced her husband to send the telegram. There is no doubt a mistake in the telegram in which she says it was an 18-carat diamond, but she was misled by the paragraph in the *Star*, which spoke of it as such. It would have been quite impossible for her to have remembered the exact size and weight of the diamond, for the last time she saw it was twenty years ago. Therefore he did not lay stress on the mistake between 18 carats and 87 carats. Now, if the defendant had admitted in this case that he had received some pebble from Mrs. Mathew, but that this stone, which ultimately proved to be a diamond, was not the one he received, I should have attached greater weight to his evidence than I do; but being satisfied as I am that he did get the pebble from Mrs. Mathew, the only question is whether the diamond is the diamond she handed to him. In order to decide between the two, I think we should look at some of the circumstances of the case which have no direct bearing on the issue, but may materially assist the Court in arriving at a conclusion. The defendant Pentz relies on the letter which he alleges he received from Mrs. Dreyer. As far as I can form any opinion on the case, I believe the letter was never written by Mrs. Dreyer at all. The handwriting does not correspond with her true handwriting. In the affidavit the defendant made on the 7th December, he does not at all refer to a telegram he had already received from his wife, stating that the letter had been found. It is too late now to ask for a postponement of the case on a question of this kind, and even if there had been no discrepancy, it would not have made any material difference to my judgment, but in my opinion the telegram was received before he made this affidavit; but when he received the telegram from his wife he was satisfied in his own mind that it was some other letter referred to. I believe it to be utterly incredible that this large stone would have been enclosed in this flimsy envelope given to Pentz. His account is that the letter was given him by Mrs. Dreyer herself. She totally denies it, and I do not think it is a letter, considering the degree of intimacy between them, which a young girl of fifteen years of age would have written to him at all. But supposing she did write it, on the face of it it shows marks of having been altered, and the words "and stone" having been written in afterwards. The ink is also different. I think these circumstances are sufficient to discredit the whole of the evidence given by the defendant. We are now reduced to this issue to decide between two alternatives. Was the diamond given to Pentz by Mrs. Dreyer as a keepsake, or was it given him by Mrs. Mathews for the purpose of discovering whether it was a diamond or not? I am perfectly satisfied that the most probable version is that given by Mrs. Mathew. I have many reasons to believe that this is the more truthful, and under these circumstances I am of opinion she is entitled to the diamond. Even supposing the Court is mistaken in supposing that Mrs. Mathews did give the diamond, and supposing it to be true that the defendant did get the diamond from Mrs. Dreyer, then it is some consolation to think that no great injustice is done in case the Court has gone wrong on the facts; because, as a man of honour at all events, the defendant ought, if his version be true, to have returned the diamond to Mrs. Dreyer, and not to have kept it. Whatever may be the law, in all honour the defendant ought to have returned it to Mrs. Dreyer, but I

do not believe his version is true. I believe it came from Mrs. Mathew, and as between the two, she is entitled to it, with costs.

Mr. Justice Smith said he concurred in the judgment except as to that part of it which referred to the letter. He believed that that letter had been written by Miss Myburgh.

Mr. Justice Buchanan remarked that his great difficulty had been to come to the conclusion that the stone, which was river-washed, had ever been picked up on the farm. He concurred in the judgment of the Chief Justice.

ROBERTSON V. ROBERTSON.

Mr. Graham, on behalf of the plaintiff, obtained leave to take the evidence, on commission, of some of the crew of the Conway Castle, which vessel was advertised to sail at two p.m. to-day Mr. Castens was appointed commissioner.

IN RE CHARLES ADSHADE, (AN ALLEGED LUNATIC.)

Mr. Juta applied for the appointment of Mr. Henry Adshade as curator of the person and property of his father, Mr. Charles Adshade.

The Court, after having heard the evidence of Mr. Henry Adshade and the affidavits of the Resident Magistrate and District Surgeon of Swellendam, declared Mr. Charles Adshade to be a person of unsound mind and incapable of managing his own affairs, and appointed his son, Mr. Henry Adshade, curator of his person and property.

GROOM AND WHITE V. THE BECHUANALAND EXPLORATION COMPANY, LIMITED.

Contract —Breach —Damages — Prospecting rights in territory of independent chief.

Mr. Searle and Mr. Sheil appeared for the plaintiffs.

Sir Thomas Upington, Q.C., and Mr. Schreiner for the defendant company.

This was an action instituted by the plaintiffs against the Bechuanaland Exploration Company (Limited), for breach of contract, damages being laid at £1,000. It appeared from the opening statement of counsel that the parties entered into a written agreement at Cape Town on the 27th December, 1889, under the terms of which the plaintiffs were to have liberty to prospect in all such portions of the Bamangwato (Khama's) country as were open to the exploration of the company's paid employés. At the date of the agreement the defendants held certain rights in and over the said country in respect of prospecting, and otherwise by written concession from Khama. Early in 1890 the plaintiffs fitted out and prepared themselves for a prospecting expedition under the agreement, and arrived in Palapye towards the end of February, 1890. In May, 1890, the plaintiffs undertook certain prospecting operations in Khama's country under the agreement, but were prevented by the company's agent from continuing the same, on the grounds that Khama objected to their prospecting in any part of his country except in the region of the Crocodile River. As no defined portions of the Bamangwato country had been specified in the agreement, the plaintiffs declined to be limited in their operations to the neighbourhood of the Crocodile River, and considering that the action of the company's agent in so limiting them amounted to a breach of contract, instituted the present action.

Charles Groom, called by Mr. Searle, stated that he had lived in England till November, 1889, when he came to the Colony with Mr. White for the purpose of prospecting for gold in Khama's country. Before he left England he had had several interviews with Mr. Weatherley, the secretary of the defendant company, who referred him to Major Johnson, the company's manager out here. A few days after his arrival in Cape Town he saw Major Johnson, who informed him that he had sent in his resignation and that it had been accepted. He afterwards introduced him to Mr. Goldschmidt, who, on behalf of the company, entered into the agreement with himself and Mr. White on the 27th December, 1889. On the following day we left for Kimberley, in which place we remained six days. On the 25th February we arrived in Palapye and reported ourselves to Mr. Heany, the superintendent of the company. We spoke to Mr. Heany about having the agreement ratified by Khama, but he said he was going away for about five days and on his return he would give the matter his attention. On his return he informed us that he had resigned, but that Messrs. Mosenthal and Stephani would treat with us. Messrs. Mosenthal and Stephani subsequently told us that we could not go on our prospecting tour just at present, as Khama would not permit us. On the 17th April we were told that we could start, as Khama had given his permission. We left Palapye on the 1st May, and about 40 miles from that town we found very good indications, and began to prospect. We were, however, prevented by a letter from Mr. Harman, telling us that Khama would not have us there, and that we must go to the Crocodile River. Witness further stated that he and Mr. White then went on about 14 miles, and again met with good indications of gold, but they were also prevented from working at this latter spot.

The plaintiffs then returned to Palapye, and they were of opinion that there was no use in going to the Crocodile River, they had received such bad accounts of that locality from other prospectors. They arrived in Cape Town on the 19th August, and commenced proceedings against the company.

Cross-examined by Sir T. Upington, Q.C.: The expenses charges were those incurred between the 28th December, 1889, and 19th August, 1890 The wagon, donkeys, and harness were bought from a European in Kimberley, who was paid in cash. He did not know the man's name. He and Mr. White gave up prospecting because Mr. Harman would not allow them to continue. The attitude of Khama did not affect them further than it concerned the company.

Re-examined: Mr. Harman did not complain of any breach of faith on their part. He considered the £80 a month claimed for himself and Mr. White very moderate indeed.

Mr. Edward White corroborated the evidence of the last witness.—Cross-examined by Sir T. Upington, Q.C.: He had experience in gold mining and prospecting in Marico, Klerksdorp, and Johannesburg. Marico had not turned out well, but he had nothing to do with that. They "panned" at the first place they stopped at but found no gold, and the second place six reefs were plainly visible. They did not pan as they had no time, but he had brought down a specimen of quartz in which gold could be seen with the aid of a glass. He was not the only man in the country who understood prospecting. He thought the question a childish one, and he might as well ask the learned counsel if he were the only "lawyer" in Cape Town. The money to defray the expenses of the expedition had been found by Mr. Groom. The climate of Palapye did not agree with him.

In answer to the Court, the witness stated that the reefs at the "second spot" were four or five feet wide. He would not consider the result obtained from crushing surface quartz a true test of the quality of the reef lower down.

Mr. Groom (recalled) stated that in his opinion there was nothing to prevent the paid employés of the company from working at the place which they (plaintiffs) had selected.

The correspondence having been put in, the further hearing of the case was posponed until next term.

SUPREME COURT.

WEDNESDAY, FEBRUARY 18.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

CLARIDGE V. KELLAWAY.

Lease. Hire and Purchase system—Cancellation of agreement owing to failure of monthly payments—Tacit renewal of lease

Sir T. Upington, Q.C., and Mr. Juta for the plaintiff.

Mr. Sobreiner and Mr. Maskew for the defendant.

This was an action instituted by the plaintiff, the owner of Claridge's Hotel, against the defendant and his wife to recover certain furniture hired to the defendants, and £50 damages for non-delivery of the same. It appeared from the opening statement of counsel that on November 30, 1888, an agreement was entered into by plaintiff and Mrs. Kellaway, assisted by her husband, upon the hire and purchase principle, under which the hirer agreed to pay £100 on December 1, 1888, £50 on the 1st September, 1889, £50 on the 1st March, 1890, and £10 per month from December 1, 1888, for the rent of the furniture. In case the hirer did not perform his part of the agreement, the owner might at once terminate the hire. The defendant might, however, purchase the furniture for £688. The monthly payments were made until October, 1890, when they ceased, and plaintiff's agents thereupon cancelled the agreement, and demanded possession of the furniture. The defendant alleged that the payments were from time to time deferred with the knowledge of the plaintiff, and that the October payment was so deferred with plaintiff's consent.

Mr. Justice Smith: Do you contend, Mr. Juta, that if payment was made on October 2, you could have taken possession of the place, and all money paid would have been lost?

Mr. Juta: Strictly speaking it is so. These agreements do appear as a hardship on one side, but they are universally accepted, and there are advantages on both sides. The defendants in the present case pleaded further that they offered £257, the balance of the purchase price of the furniture, after deducting the amounts previously paid, but this was refused.

Mr. Thomas Herbert Hazell, partner in the firm of Steer & Co., plaintiff's agents, examined by Mr. Juta, stated that the first three instalments under the agreement had been paid by defendant. The rent, £10 a month, had not been paid regularly;

witness had frequently to send for it, and had often told defendant that if he were not more regular in his payments he would run the risk of the agreement being cancelled. The agreement had been entered into with Mrs. Kellaway, as the defendant said that if he entered into it his position as caretaker of the Houses of Parliament might be affected. Witness sent several times for the rent in October. He knew that Kellaway was in financial difficulties. The furniture had been attached in October under a judgment of the Resident Magistrate's Court. On the 28th October he gave defendant notice of the cancellation of the agreement. On the same day a meeting of Kellaway's creditors was held. He attended the meeting, and refused an offer of the balance due on the furniture. After the meeting Mr Kellaway and his brother-in-law (Mr. Jex) called to see him, and offered him the October rent, which he refused, telling them that the agreement had been cancelled. The defendant then said, "Surely you are not going to exact those rights." Witness replied that he was acting under legal advice, though contrary to his own sense of justice, but he would see what he could do with his principal (Mr. Claridge).

Cross-examined by Mr. Schreiner: He could not fix any date upon which the warning of probable cancellation was given. Witness consented to look after defendant's interests in so far that he was not humbugged. The agreement for the lease of the premises was entered into concurrently with the hire and purchase contract. The first payment of £10 per month was not made until January 8 instead of January 1st. Witness was of opinion that under both contracts the payments should be on one day, but it might have been implied that they ran concurrently. Defendant had paid up to the 31st of August. When defendant made the verbal contract witness believed he had the money in his pocket. Witness said that if Claridge acted on his advise the contract would be reinstated.

Mr. Wahl, clerk to Steer & Co., corroborated Mr. Hazell's evidence as to demanding the rent from defendant in October.

Mr. Kellaway, called by Mr. Schreiner, stated that the lease was executed on the 30th November, 1888, and the first payment was made on the 3rd December. Mr. Hazell gave him to understand that as long as he paid £40 a month he would be all right, and that he (Hazell) would look after his interests. Mr. Hazell never told him there was danger of the lease being cancelled; £420 had been paid under the agreement. Witness further stated that he was ready to pay the balance

Cross-examined: At times Hazell told him to be earlier in his payments. He would swear that Hazell never told him he ran the risk of having the agreement cancelled.

Mr. Bonnes (accountant) stated that he made an offer by letter to Mr. Villet, of Steer & Co., to pay the balance due on the furniture.

Mr. Juta then proceeded to argue that under the terms of the agreement there had been a forfeiture, and that the plaintiff was within his rights in cancelling the agreement.

Mr. Schreiner contended that there had been no breach of the agreement, and that the plaintiff was practically out of Court.

The Chief Justice in giving judgment, said the whole question depended upon whether on the 28th of October the lease of hiring had or had not expired. In his opinion it had not expired when the defendant gave notice that he would pay the balance of the purchase price on that day. It was a question of fact whether there was a tacit renewal of the lease during the month of October. For twenty-eight days the defendant was allowed to occupy the premises, and he (the Chief Justice) was satisfied that on the 28th October the plaintiff had debarred himself by his own acts from insisting on the defendant giving up the furniture, and he was bound to allow him time to the end of the month before he could claim it. The hire purchase had not expired, and defendant had the right under the 9th clause to exercise his option of purchase. It was clear the defendant was entitled to the judgment of the Court. There was some difficulty in regard to the form of judgment, there being no claim in reconvention, and the defendant still tendering the balance of the purchase price. If Mr. Juta would accept judgment for the amount tendered that would end the difficulty, but plaintiff would not be entitled to costs. Judgment would be for the plaintiff for the amount tendered, but plaintiff to pay costs. They had also to protect the interests of the plaintiff, and under the judgment the furniture was to remain his property until the balance, less the taxed costs, had been paid.

THORNE AND STUTTAFORD V. MCNALLY.

Contract—Agreement with employee—Construction—"Absent from whatever cause."

Mr. Schreiner for the appellants.

Sir T. Upington for the respondent.

This was an appeal from a decision of the Resident Magistrate of Cape Town, in a case in which the respondent (the plaintiff in the Court below) had sued Messrs. Thorne & Stuttaford for £1 10s., an amount deducted from her wages in consequence of her absence through illness. The Resident Magistrate held that the plaintiff had not "absented" herself within the meaning of her agreement with defendants, and gave judgment for the plaintiff with costs. From this decision the defendants now appealed. Mr.

Schreiner, in supporting the appeal, contended that both under the terms of the agreement and by the common law (Voet, 19, 2, 27) the appellants were justified in deducting an amount of the respondent's salary proportionate to the time during which she had been absent. The matter in dispute was small, but this was merely a test case, and was one of great importance to large employers of labour.

Sir T. Upington, Q.C., for the respondent, submitted that there was practically no difference between the common law of England and the common law of this country with regard to the absence of servants through illness, and contended that the passage cited from Voet was in his favour. The Magistrate had put a reasonable construction upon the clause of the agreement referring to absence, which meant voluntary or wilful absence and not absence through ill-health. Counsel, in support of his contention referred to the case of "Cuckson v. Stones" (1, E. and E., 248), and prayed that the appeal might be dismissed with costs.

The Chief Justice in giving judgment, remarked that the decision of the Court would have to depend upon the construction of the clause of the agreement referring to absence. The clause said from "whatever cause," and although he would like to be able to construe that clause as the Magistrate had, he did not see how it was possible. The Magistrate held that the words "absent herself" applied only to cases in which the respondent had voluntarily absented herself and not to cases in which she was unable to attend through illness. It had not been proved that she was physically incapable of going to business; in fact, she had absented herself. The appeal must be allowed, and the judgment of the Court below reversed. No order would be made as to costs.

SUPREME COURT.

THURSDAY, FEBRUARY 19.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

ADMISSION.

On the application of Mr. Juta, Mr. William Alfred Tindal was admitted to practise as an attorney-at-law and notary public.

EXECUTORS OF LOYNES V. COCHRANE.

Mr. Jones, on behalf of the executors, applied for provisional judgment on a promissory note for £25.

Mr. Searle, for the respondent, prayed for a stay of execution, and offered to pay £4 a month.

The note on being put in was found to be unstamped, and a penalty of £1 was inflicted.

Provisional sentence was granted, subject to the payment of the fine and ordinary office stamp.

FLETCHER V. HUGO.

On the application of Mr. Thorne, provisional sentence was granted on a promissory note for £55 6s. 6d., with interest from the 22nd December, 1890.

JACKSON V. CUTTING.

Leave was granted, on the application of Mr. Searle, Mr. Juta agreeing, for the case to stand over *sine die*.

LIQUIDATORS CAPE OF GOOD BANK V. JOEL.

Mr. Schreiner prayed for provisional judgment for £9,875 9s. 4d.—Provisional sentence granted as prayed for.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Henry Brink, Johannes van der Westhuysen, Johannes Lodevicus Roux.

PARKER V. HOPKINS.—DE LUNATICO INQUIRENDO.

Mr. Schreiner, on behalf of the applicant, moved that the rule *nisi* granted on Thursday last calling upon the respondent to show cause why she should not be declared of unsound mind and incapable of looking after her own affairs might be made absolute.

Dr. Herman, called by Mr. Schreiner, stated that he had examined Mrs. Hopkins on the 1st February at her house in Maitland. He found that she was just recovering from a stroke of paralysis and appeared to have completely lost her memory. When he questioned her as to where she was living she said in Kimberley. She had forgotten her own name and appeared to be suffering from delusions, one of which was that her father had fired the first gun at the battle of Waterloo.

In answer to the Court, the witness stated that physically the respondent was improving, but that mentally she was becoming worse. If she committed a crime in her present condition he did not think she could be held liable for her act. She was not actually of unsound mind, but she was weak minded.

Mr. Castens, the *curator ad litem*, informed the Court that he had had an interview with Mrs. Hopkins and found her condition such as had been stated by Dr. Herman.

The Court found that the respondent was not of sufficiently sound mind to look after her own affairs, and appointed Mrs. Parker curator of her property. Costs to be paid out of the estate.

DALTON V. QUINE.

On the motion of Mr. Castens, leave was given to the defendant to sign judgment against the plaintiff for failure to proceed with the action instituted by him.

COLONIAL ORPHAN CHAMBER V. MARNITZ.

Postponed till 12th March.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION.)

Mortgage Bonds satisfied and subsequently lost or mislaid—Application for cancellation of—Rule existing in registry of Deeds, Cape Town—Refusal to comply with rule by Registrar of Deeds King William's Town—Rule *nisi* granted.

Mr. Schreiner moved, on behalf of the liquidaters, for authority to the Registrar of Deeds at King William's Town to cancel in the Debt Registry certain three mortgage bonds, amounting to £82,000, passed by Charles Edward Nicholls and his wife in favour of the said bank, such bonds having been satisfied, and subsequently lost or mislaid. It appeared from the statement of counsel that a rule existed in the Deeds Office, Cape Town, by which bonds that had been satisfied and subsequently lost were cancelled on notice being given in the *Government Gazette* and newspapers of the district, in which the subject of the bonds was situated. The Registrar of Deeds at King William's Town refused to conform to this rule without the authority of the Court, and hence this application.

Mr. Justice Buchanan suggested that, as there had been litigation about the bonds in question, it was just possible that they might be among the records of the Eastern Districts Court.

The Court granted a rule *nisi*, calling upon all persons interested to show cause why the bonds should not be cancelled. Notice of the rule to be published in the *Government Gazette* and *East London Dispatch*.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION) IN RE CARONEL'S CONTRACT.

Company—Bank in liquidation—Contract entered into between liquidators and debtor of bank approved of by Court.

Mr. Schreiner moved for leave to the liquidators of the Cape of Good Hope Bank to enter into a contract whereby the said Caronel shall be discharged from his liability to the bank in terms of agreement come to between the parties.

It appeared that Caronel was indebted to the bank in the sum of £40,768, against which the bank held scrip valued at £8,515. In consideration of the liquidators abandoning any further claim against him, Caronel had offered them a quarter-share in the farm Wesselton, which was supposed to be diamondiferous. The liquidaters anticipated a large profit if the agreement were sanctioned by the Court, whereas if they proceeded to extreme measures with Caronel they would probably get nothing.

The Chief Justice: In the event of the debts being paid off in full, is the balance to be divided between the liquidators and Coronel?

Mr. Schreiner: That is the arrangement, my lord, but a large sum of money may be made by the transaction.

The Chief Justice: Is the right to the quarter in dispute?

Mr. Schreiner: It is possible that it may be the subject of litigation, but none of the expenses will be paid out of the liquidation.

The order was granted as prayed for.

CAPE OF GOOD HOPE BANK (IN LIQUIDATION.)

Company—Bank in liquidation—Order in terms of Liquidators' Report—Dividend—Remuneration of Liquidators.

Mr. Schreiner moved for an order in terms of the recommendations of the official liquidators, contained in their second report, dated 2nd February instant. Continuing, counsel said the first matter he would mention was that, owing to some oversight, the publishers of the *Cape Argus* omitted to insert the last order of Court, consequently publication as ordered had not been fully complied with. However, as the *Argus* published the second report in full, together with a full report of the application, he would ask that that might be taken as sufficient compliance with the order.

The Chief Justice assented.

Mr. Schreiner then moved for leave to pay a second dividend of 5s. in the £ on and after the 1st of March. Assets were in hand sufficient to

cover it, and he also requested that the liquidaters might have power to pay future dividends from time to time, as the funds permitted.

The Court fixed the future dividends at not less than 1s., but left it to the discretion of the liquidators as to increasing that amount.

Mr. Schreiner remarked that the only remaining order was regarding the liquidators' remuneration. They had been anxiously engaged in the liquidation, to the almost entire exclusion of other business. The liquidation was the largest that there had been in the country, and the position of the bank was wholly unlike any other in respect of the number of branches. In the matter of the Union Bank the two liquidators appointed were gentlemen who represented certain companies, but in the Cape of Good Hope the case was different.

The Chief Justice: Is there any large staff engaged?

Mr. Schreiner: A certain number of the old employés have been kept on.

The Chief Justice: Has anything been saved by having so many liquidators?

Mr. Schreiner replied that a good many clerks at the various branches had received notice, and some of the liquidators were generally away. One had been in the Transvaal, and the others had their hands full.

The Chief Justice: The question is on what principle the remuneration is to be computed. Is it to be on salary or percentage?

Mr. Schreiner suggested that up to £1,500,000 the liquidators might divide 1 per cent.

The Chief Justice: That would mean £15,000.

Mr. Schreiner: But it will extend over a period of three years, and will be only about £1,000 each per year. Then after that I suggest there may be the ordinary insolvency allowance above a million-and-a-half of 2½ per cent.

The Chief Justice remarked that when the liquidators were appointed the Court pointed out that the number was very large, and it was probable the same amount would be awarded as if two first-class men had been appointed. He was inclined to think the remunerations should be a salary for the first year of £4,000, or £800 each, and let the succeeding years be decided afterwards.

Mr. Schreiner stated that the Transvaal liquidators had one-half per cent. on the assets collected, and £100 each for the very short time the three of them were in office. The Cape liquidators had naturally a delicacy in discussing the matter of remuneration.

The Chief Justice: I don't see why counsel should have. (Laughter.)

Mr. Schreiner: Well, the delicacy reflects itself. (Renewed laughter.)

The Chief Justice said that creditors had had no opportunity of expressing any opinion as to what the remuneration should be, and in the absence of any such expression of opinion the Court thought that for the first year £4,000 would be sufficient. What the remuneration was to be in subsequent years would depend to a great extent on the expression of the wishes of the creditors, and on the actual result of the liquidation.

The second report, together with the recommendations contained in it, was then confirmed.

WILSON V. WILSON AND MINNAAR.

Mr. Juta moved, on the petition of the first-named defendant, for leave to defend *in forma pauperis* the action instituted against her by her husband for divorce.

It appeared that there was an informality in the matter, one of the parties, who was a J.P., having certified that the other party was not worth property of the value of £10.

Mr. Justice Buchanan said they would soon have a clergyman marrying himself. (Laughter.)

The application was granted, subject to the production of a proper affidavit.

CLARIDGE V. KELLAWAY.

Mr. Juta stated that the amount settled upon by the parties in this action, heard yesterday, was £262 8s. 8d.

The Chief Justice said the judgment would therefore be for the plaintiff for that amount as tendered, plaintiff to pay costs, the furniture to remain his property until payment of the tender is made, less defendant's taxed costs in the suit.

FRANCIS BROS. V. SCHUNKE.

On the application of Mr. Searle, this matter was allowed to stand over until to-morrow.

SUPREME COURT.

FRIDAY, FEBRUARY 20.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr Justice BUCHANAN.

OLIVER V. OLIVER AND PECKOVER.

Divorce—Damages—Assault—Claim in reconvention.

Mr. Schreiner and Mr. Molteno appeared for the plaintiff; the first-named defendant in default; the co-defendant appeared in person.

Mr. Schreiner, having obtained leave to amend the declaration, stated that the action was insti-

tuted by the plaintiff (Mr. Robert William Edward Oliver), a shopkeeper, carrying on business in Heidelberg, in the district of Swellendam, against his wife, Mrs. Alida Maria Oliver (born Brand), for divorce by reason of her adultery with the co-defendant, who until lately had been a "captain" in the Salvation Army. Damages for £250 were claimed against the co-defendant. The co-defendant, in his plea, denied the alleged adultery, and claimed in reconvention the sum of £500 in respect of an assault committed upon him by plaintiff (the particulars of which are fully set forth in the co-defendant's statement). The replication admitted the assault, but pleaded that it had been committed under great provocation, and tendered in satisfaction of same £50, to be deducted from the damages which might be awarded to the plaintiff.

Mr. Norman Lacy, clerk in the Colonial Office, having produced the marriage register,

Mr. Schreiner called the plaintiff,

Mr. Oliver, who stated that he was married to the respondent at the Dutch Reformed Church, Heidelberg, in 1880. There were five children, the youngest eight months old. The co-respondent, Peckover, came to Heidelberg about March last year. He was an officer of the Salvation Army, in which witness was also at that time interested. Peckover had his meals at witness's house, to which he had free access. In November last the co-respondent went to Riversdale. About the previous July witness received information upon which he taxed his wife with infidelity, but she denied it, and referred him to Peckover. She admitted that whilst witness was away they had been up late hanging pictures, and Peckover confirmed this. As he was a captain of the Salvation Army, witness believed him. There was a Mrs. and Miss Osmond in the house during August and November. When witness returned his wife received him very coldly, but appeared distressed at Peckover's departure. On account of a letter which witness saw, his suspicions were again awakened, and he intercepted a letter at the post-office addressed to Philda Adrianse, a servant of his, who gave him permission to open the letter, which was in Peckover's handwritting. About the same time he received a letter from Peckover, thanking him for his kindness. Co-respondent was a single man, so far as witness knew. The letter addressed to Philda Adrianse was really to witness's wife. It was a long one couched in most affectionate terms.

Mr. Schreiner informed the Court that it ran to ten brief sheets.

The Chief Justice: It is a sermon? (Laughter.)

Mr. Schreiner: Is it more like the Song of Solomon. (Great laughter.)

Evidence having been given showing the relations between Peckover and Mrs. Oliver,

Mr. Schreiner was proceeding to call other witnesses, when

The Chief Justice said that for the present the letter showed the relations between the parties. Addressing the co-respondent, he asked him if he had any witnesses.

Peckover: No.

The Chief Justice: Do you wish to give evidence yourself?—Yes, my lord; I would like to speak on several matters.

The question is whether you will give evidence on oath. Do you understand? We cannot waste time?—Yes. [Co-respondent then went into the box.]

Have you seen this letter?—Yes.

Did you write it?—Yes, my lord.

It is a very affectionate letter?—Yes.

Well, is the statement that you were in the bedroom with Mrs. Oliver true or not?—Mrs. Oliver called me in, and I went to the door. She said she was sick. I said I was very sorry. I left, after saying "Good night." It is not true I took my boots off.

You say you never committed adultery with her?—I never did.

Now, about the tarring and feathering; what do you say to that?—On the 22nd November I received a letter from Mr. Du Preez, Mr. Oliver's agent, respecting some money, and stating that a letter had been discovered which would be used against Mrs. Oliver in an action for divorce. I was at Riversdale, and I said to my "lieutenant," "I shall resign at once, in order not to bring the Army into disgrace, before the things come out to the world." I wrote my resignation, and proposed to leave for Kimberley. I left by private cart, and arrived at Heidelberg in the morning. After breakfast at a friend's house, I was walking up, when I heard the sound of voices, and found a crowd of men coming towards me.

Now come to the point. What did they do to you?—They made a run for me. Mr. Kemp caught hold of me.

Is he a member of the Salvation Army?—No, he is a canteen-keeper. (Laughter.) Proceeding, witness said the crowd then put him in a woolsack. Mr. and Mrs. Oliver were among the crowd, and she was asking her husband not to have anything to do with the affair.

She saw you put in the woolsack?—I believe so.

Mr. Justice Smith: Had you your clothes on? Yes. They pulled or dragged me from the hill to Mr. Oliver's office, and there, by the order of Mr. Oliver and others, I was undressed. They took all my clothing off except just a flannel band round my waist. Then I was tarred with a tar-brush from the head to the knees, and then the feathers were thrown all over me.

The Chief Justice: Were you quite undressed?

Witness: Yes, I had just one sock on, and the

hand round the waist. I ran to the door and asked for clothes, and was kicked off the stoep. Then I went straight to the Magistrate, and made a deposition. Mrs. Oliver was near, and cried, "Never mind, Peckover, God sees all, and knows you are not guilty." She did not say as the plaintiff alleged, "Didn't I tell you you would get me into this trouble?"

What about the letter?—It was written by me, but I am very sorry it was. It was written in reply to one from Mrs. Oliver.

Then all the affection came from her?—Well, it was her winning ways and conduct towards me that led to this.

Cross-examined by Mr. Schreiner: I was entertained by Mr. Oliver. He was then a friend of mine.

The Salvation Army won't tolerate what has been proved against you?—No, of course not.

Have you ever kissed Mrs. Oliver?—Yes.

How many times, thousands?—No.

What do you mean by putting "thousands of kisses" in pictorial style in that letter—a bathful, a seaful of kisses and love, and more to follow"—what do they mean?—They mean nothing.

Is that your habit with women generally?—No.

What does "O.G." mean at the bottom of the letter?—There is no definite meaning. I just put it without any definite meaning to it.

It simply bubbled out of your affection?—Witness did not answer.

The Chief Justice pointed out that there would have been ground for damages if the plaintiff had not taken the law into his own hands to feather and tar the co-respondent.

Mr. Schreiner submitted that the damage sustained by the co-respondent was not equal to that sustained by the plaintiff. Peckover's act was a dastardly violation of the hospitality of a friend, under the guise of a minister of religion. His conduct had been most atrocious.

The Chief Justice: Can the respondent pay anything at all?

Mr. Schreiner: I believe there may be some payment.

This concluded the evidence, and the co-respondent briefly addressed the Court, observing that he had sustained great damage to his character—(laughter)—through these proceedings, and seeing that the charge had not been proved, he asked for monetary redress.

Mr. Justice Smith: What is your occupation?

Co-respondent: I am a grocer by trade.

The Chief Justice, in giving judgment, said he had no doubt whatever that the co-respondent had been guilty of adultery with the respondent, Mrs. Oliver, and it was committed under circumstances which had been justly commented upon by Mr. Schreiner as being of a very aggravating character. The co-respondent Peckover was harboured in the plaintiff's house as a friend, and treated hospitably, and the reward of his kindness was for Peckover to commit adultery with his wife. If the plaintiff had not taken the law into his own hands, and it had been proved that the defendant had means to pay, the Court would undoubtedly have awarded heavy damages, but plaintiff appealed only to his own private tribunal, collected his friends, and committed a most gross assault on the co-respondent. In respect of the assault, under ordinary circumstances, the Court would have given very substantial damages to the co-respondent as against the plaintiff. Under all the circumstances the Court thought some damages ought to be awarded to the plaintiff, notwithstanding the fact that he took the law into his own hands, but they would be only £50. The plaintiff admitted the damages he ought to pay to the co-respondent to the same amount, and the damages awarded to the one would be set off against the damages awarded to the other. Judgment would therefore be for the plaintiff as against the first defendant, his wife, for a decree of divorce, with the custody of the children, and as against the co-respondent, Peckover, for £50 damages with costs. In regard to the claim in reconvention by the co-respondent, judgment would be given for the plaintiff in reconvention for £50, but notwithstanding that he (Peckover) was awarded some damages, the Court was of opinion that he should pay all costs of the suit. The first defendant (Mrs. Oliver) would forfeit all the benefits she received by virtue of marriage in community.

GILL V. HIRSCH.

Trespass — Damages — Road — Divisional Council—Acts 27 of 1884 and 40 of 1889. —Perpetual Interdict.

Sir T. Upington, Q.C., and Mr. Graham for the plaintiff.

Mr. Schreiner and Mr. Webber for the defendant.

This was an action for trespass and damages instituted by the plaintiff, Professor James Gill, against the defendant, Mr. Isidore Hirsch. Both the parties live in Muizenberg. It appeared from the opening statement of counsel that defendant, at different times between the years 1888 and 1890, dug and carried away sand from plaintiff's ground, which abuts the main road to Simon's Town, thereby endangering, as it was alleged, plaintiff's fences and trees, and causing damage in respect of which £100 was claimed. Last term Mr. Justice Smith made absolute a rule *nisi* interdicting the defendant from continuing the acts complained of, and directing the applicant to bring an action forthwith to assert his rights. The case now came on for hearing.

Mr. A M. de Witt, civil engineer, stated that he had examined Professor Gill's fences and ground, and had prepared the plan put in.

Cross-examined by Mr. Schreiner: Witness could not say if the trees had been damaged, the roots were certainly exposed.

Professor Gill, the plaintiff, examined, stated that he bought the property in 1881. About eighteen months ago he saw a man named John van der Poll digging sand in front of his house. Witness told him to desist and he went away, but on the following day he saw Henry van der Poll, and subsequently a man named De Bruins, digging in the same place; the latter told him he was digging the sand for defendant with the permission of the Divisional Council. Witness immediately wrote to Mr. Hirsch, and received as a reply a "memo" on his own letter from defendant saying that he (witness) was not to bother him with any more letters. He subsequently learned from the secretary of the Divisional Council that no permission had been given Hirsch to dig for sand on the ground. His fence and trees had been considerably damaged, many of the tap roots even being exposed.

Cross-examined by Mr. Schreiner: Witness had waited a considerable period before taking action in the matter, as he was waiting for Mr. Johnson, the road inspector, to come and view the part of his property injured. It was only in August last when he heard defendant tell De Bruins to cut away all the bank that he applied for an interdict. He was of opinion that the tap roots of the Port Jackson willows had been cut through; the roots all along the bank had been cut and were hanging in "festoons."

Mr. Hugo, examined by Mr. Schreiner, stated that he was a member of the Cape Divisional Council. He had seen the embankment from which the sand had been taken away. He was of opinion that, for ordinary purposes of traffic, the road was wide enough, but it was very desirable that it should be widened. The Divisional Council had appointed a committee to define the limits of the road. He thought 30 feet would be a proper limit. He did not think any damage had been occasioned by removing the sand.

Mr. Molteno (Government Surveyor) put in a plan which he had prepared, and expressed his opinion that no damage had been done to Professor Gill's property.

The Chairman of the Financial Committee of the Divisional Council was then examined, and corroborated the evidence of Mr. Hugo.

Joseph Norman, overseer of roads, stated that he had given permission to remove the sand, acting upon discretionary powers given him by Mr. Lister, the former inspector.

Mr. Hirsch, the defendant, examined by Mr. Schreiner, stated that since 1881 he had been getting sand from different parts of the embankment all along the road. He had no permission from the Divisional Council. Mr. Lister, the former inspector, had always told him where he could get the sand from. No damage had been done to Dr. Gill; on the contrary, his property had been improved.

This closed the evidence.

Mr. Schreiner, for the defendant, contended that the property in the road was vested in the Divisional Council, and that it was for the Court to define the fair limits of the road. He referred the Court to Acts 27 of 1884 and 40 of 1889, and submitted that this action would never have been brought were it not that a certain amount of bad feeling existed between the parties, the maxim *de minimis non curat lex* applied, and the Court ought to take that view of the matter.

The Court, without calling upon Sir T. Upington, gave judgment for the plaintiff, made the interdict perpetual, and awarded £10 damages and costs.

SUPREME COURT.

MONDAY, FEBRUARY 23.

[Before the Chief Justice (Sir J. H. DE VILLIERS, Mr. Justice SMITH and Mr. Justice BUCHANAN.]

ROBERTSON V. ROBERTSON.

Mr. Graham for the plaintiff; defendant in default. This was an action instituted by Mr. William James Robertson against his wife Emma Violet Scott Robertson (born Brown) for divorce by reason of her adultery with one Julius Hacker.

The Court, after hearing the evidence of Mr. Robertson, granted the decree as prayed for, gave the plaintiff the custody of the child—the only issue of the marriage—and ordered the defendant to forfeit all benefits under the marriage contract.

IN THE INSOLVENT ESTATE OF MESSRS. DE WAAL AND CO.

On the application of Mr. Molteno, Mr. Petrus Jacobus Bosman was appointed provisional trustee, with power to carry on the farming operations in the estate.

D'ARC V. BENSON AND MCDERMOTT.

Interdict restraining sale of effects attached by Deputy Sheriff pending decision of Court as to property in said effects.

Mr. Searle, on behalf of Mr. Brodziak, applied

for an interdict to restrain the sale of defendants' effects at present attached by the Deputy Sheriff of Uitenhage under an order of the Supreme Court, on the grounds that the property in question, which consisted chiefly of roller skates, had been sold to Mr. Brodziak before the order of the Court had been made.

The Court granted a rule *nisi* restraining the sale pending the decision of the Court as to the property in the goods in question, one copy of the rule to be served on the Deputy Sheriff of Uitenhage and the other on D'Arc.

KÜÜN V. SCHALKWYK.

Negligence—Bursting of Dam—*Vis major.*

Mr. Schreiner and Mr. Graham for the plaintiff. Mr. Searle and Mr. Watermeyer for the defendant.

This was an action instituted by Lourens Christian Küün against the defendant Gerrit Duikse van Schalkwyk, for £150, damages alleged to have been sustained by the bursting of a dam on the defendant's farm. Both the parties are farmers residing in the district of Victoria West, and are owners of adjoining properties. On the 30th October, 1890, a dam, which had been built for about thirty years and was situated on Taaiboschfontein, the defendant's farm, burst owing to an unusually severe storm and consequent rising of the river. The water issuing from the dam rushed down with great violence on to the farm of plaintiff (Grootfontein). The walls of plaintiff's garden were carried away, the garden itself and the lands under cultivation were inundated, and his water-furrow considerably injured. In respect of these injuries damages were claimed. The defendant, in his plea, admitted the bursting of the dam, but denied that it had been occasioned through any fault of his, and pleaded that he was not liable for the act of God or *Vis major.*

Mr. Küün, examined by Mr. Schreiner, gave particulars as to the bursting of the dam and the rush of water on to his land. With regard to the amount of damage which he had sustained he calculated that it would cost 2s. a yard to rebuild his wall, injury amounting to £20 had been done to his furrow, £10 had been expended in repairing the wall at the river, and he could not value his vegetable garden at less than £10; he had also lost considerably over his crop of wheat.

Cross-examined by Mr. Searle: His sluice was broken on the 30th October, between four and five p.m. On the 4th November the field-cornet came and assessed the damages. He said then that he estimated the damages at £25. He did not at that time, however, know that his wheat had been injured. He did not remember the field-cornet giving him a paper on which the damage had been assessed at £16.

Mr. Auret, examined by Mr. Schreiner, stated that he was a land surveyor, residing in Victoria West, and had prepared the plan put in. The depth of the water at the wall was about 12 feet, allowing 6 feet of silt. The dam had not been repaired when he saw it. The length of the break in the wall was about 60 feet. He had had experience in dams, but had never constructed any.

Cross-examined by Mr. Searle: He had only made a rough sketch. He did not measure the main stream at any point.

Several other witnesses having corroborated the plaintiff's evidence with regard to the damage,

Mr. Jacobus Schmid stated that he had been at one time part owner of Grootfontein. He had seen the damage which had been done, but could not estimate it.

Cross-examined by Mr. Searle: He knew that Mr. Levenberg had assessed the damage at £16, but witness could not say if that were a fair valuation.

In answer to the Court, witness could not say whether the inundation of the lands had produced rust.

SUPREME COURT.

TUESDAY, FEBRUARY, 24.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

KÜÜN V. SCHALKWYK.

The further hearing of this case was resumed.

Mr. Schreiner, and Mr. Graham, for plaintiff.

Mr. Searle, and Mr. Watermeyer, for the defendant.

John George Küün, attorney-at-law, examined by Mr. Schreiner, stated that he had been on the farm Grootfontein a few days after defendant's dam had burst. The water had washed above the sluice wall. The sluice was being built up when he saw it. Three sides of the garden wall had been damaged, and 184 yards in all had been washed away.

Cross-examined by Mr. Searle: He was instructed to write to defendant, claiming £150 damages some time after he had visited Grootfontein. He had heard that the field-cornet had been to the farm, but he had not received the paper referred to in Mr. Küün's evidence. Witness had been a farmer before he became an attorney, but he had no experience in building walls.

This concluded the evidence for the plaintiff.

Mr. G. D. van Schalkwyk, the defendant, examined by Mr. Searle, stated that he had been the owner of the farm Taaiboschfontein for fifteen years. It was a large farm, in extent about 8,200 morgen. He had several dams in his farm. About twelve years ago he increased the Taaiboschfontein dam by about 20 yards in length and 4 feet in height. The dam could contain 3 feet 2 inches of water. His house was situated below the dam, and further down were cultivated lands and kraals. On the 30th October last the dam burst. A fearful storm passed over his farm between five and six p.m. on that day. He had never seen a more severe storm in that part of the country; patches of the veld were washed away, his furrows were injured, and about 100 feet of the top of his dam were carried away. On the following Saturday he received a letter from Mr. Küün claiming damages. On Thursday, 30th October, before his dam burst there was a torrent of water rushing down the main furrow. He had always kept his dam in good repair, and in the month of February preceding the accident he had had his dam thoroughly overhauled and repaired. No complaints had ever been made as to the state of his dam. He had frequently seen the sluice on plaintiff's farm as he was riding along the road; the top of the sluice used to be lower than the banks of the river, but lately it had been built higher. To witness's knowledge the sluice had been washed away several times, and this had happened four times during the occupation of the farm by the plaintiff, that is within the past four years. In answer to the Court, the witness further stated that the water from his dam would probably have reached the plaintiff's farm about 8.30 on the evening of the 30th October. Last year his crops and his neighbours' had suffered from rust. When he first saw Küün after the accident the latter estimated his damage at £25, but subsequently witness received a letter of demand for £150.

Cross-examined by Mr. Schreiner: The storm appeared to pass over Taaiboschfontein and Grootfontein, but most of its force was expended on witness's farm. None of his stock had been injured by the storm. He had his evening meal between eight and nine. The dam burst before this hour. His house was situated about 500 yards from the dam.

Several witnesses having corroborated defendant's evidence,

Mr. Levenberg (field-cornet), examined by Mr. Searle, stated that he lived about twelve miles from plaintiff's farm. On the 4th November he received a letter from Mr. Küün, asking witness to come to his farm and assess the damage which had been occasioned by the bursting of defendant's dam. Witness assessed the damage at £16, and Küün appeared satisfied with that amount. He had measured defendant's dam after the accident. It was 29 feet at the base and 4½ feet at the top He considered the dam had been substantially built. His wheat had suffered from rust this year.

In answer to the Court, witness stated that he was of opinion that if the sluice were not in its present position, and the bank of the river were in its natural state, the plaintiff's land would not have been inundated.

Cross-examined by Mr. Schreiner: In estimating the damage he had allowed for the destruction of 160 yards of wall, for re-erecting the sluice, and for repairing the furrow. He had not seen defendant's dam before it had burst.

Frederick Manuel stated that he was in Mr. Küün's employment last year, but at present he was in the service of the defendant. He was present when the sluice was washed away. It was about half-an-hour before sunset. After the sluice had been washed away he went to collect the cattle.

Cross-examined: He left plaintiff's service about a month ago. He had been in the "tronk" on a charge of having poisoned his wife, but had been acquitted at the trial. The information on which he was arrested had been lodged by plaintiff He remained in the house during the rain. He afterwards went to look at the sluice, and found that it had been washed away.

Re-examined: After he had been acquitted he was for a year in the service of the plaintiff.

The evidence of Mr. Smid closed the case for the defendant.

Mr. Schreiner having addressed the Court,

The Chief Justice, without calling upon Mr. Searle, remarked that he was clearly of opinion that the injury sustained by the plaintiff had been caused, not by the bursting of the defendant's dam but by the swollen condition of the river consequent on an unusually severe storm. All the facts were in defendant's favour, more especially with regard to the time when the land was flooded. The water from the dam could not have reached plaintiff's land until about 8.30 p.m., whereas the plaintiff swore that his sluice had been washed away between four and five p.m. The plaintiff's case had wholly failed, and therefore judgment would be for the defendant with costs.

MACKIE DUNN AND CO. V. THE POTCHEFSTROOM EXCHANGE COMPANY.

Attachment of funds in hands of Company *ad fundandam jurisdictionem*—Einwald v. The German West African Company (5 Juta 86) considered and followed.

Mr. Schreiner moved, on behalf of Messrs. Mackie, Dunn & Co., of Port Elizabeth, for an

order to attach the whole or part of £5,000 due from the Commercial Union Assurance Company, of Cape Town, to the Potchefstroom Stock Exchange Company (Limited), in order to found jurisdiction in an action about to be brought by the applicants for the recovery of £264 14s. 3d., with interest from July, 1890, being a debt originally owing by the defendants to one Falkiner in part payment of the contract price for erecting the exchange, thereafter assigned to one Selinger, and by the latter ceded to the petitioners. The applicants stated that their debt was wholly unsecured, and having learnt that £5,000 was owing by the Company on a fire policy, desired to attach it.

The Chief Justice remarked that the mere fact that there was property in the country belonging to the defendants did not give jurisdiction.

Mr. Schreiner submitted that inasmuch as the defendant Company had entered into a contract within the jurisdiction, namely in Cape Town, with the Commercial Union Assurance Company, that was sufficient to enable the Court to grant the order applied for.

The Chief Justice said that the plaintiffs might adopt the course of saying to the Insurance Company that if they paid the claim out of the £5,000 they would indemnify them.

Mr. Schreiner said the Assurance Company would not do this without an order of Court.

The Chief Justice, in refusing the application, said as at present advised he could not distinguish this application from that of "Einwald v. The German West African Company," where the Court went fully into the law. For the present the application must be refused, but if Mr. Schreiner could find any authorities showing that a distinction existed between the case of a person suing on the original contract and a person suing as cessionary and being domiciled in the Colony, he would still be at liberty to apply again.

PREISS V. GLUCKMAN.

Action—Postponement of in consequence of unavoidable absence of defendant—Payment of tender.

Mr. Schreiner, on behalf of the defendant, applied to have the case which is set down for trial on the 27th instant postponed, owing to the defendant being in the Free State.

Mr. Juta opposed the motion, on the grounds that the defendant had had ample notice of the date of trial.

The Court granted the postponement on condition that the defendant immediately paid to the plaintiff £42 14s. 10d., the amount of his tender, and the costs of the present application.

CAMPAAN V. CAMPAAN.

Mr. Jones moved on behalf of Louisa Frederika Campaan, at present living at Xalanga, Tembuland, for a decree of restitution of conjugal rights against her husband, John Hawkes Campaan, at present living at Middelburg, in the Transvaal. The parties were married at Dordrecht in November, 1885, and lived together about six weeks, when the husband deserted his wife, who had never seen him since. She had asked him to come back, by letter, but he had refused.

The Court granted the decree, the defendant to return to his wife, or receive her, on or before the 31st March, failing which to show cause on the first day of next term why a decree of divorce should not be granted.

WALKER V. THE CAPE CENTRAL RAILWAYS.

Sir T. Upington, Q.C., and Mr. Juta for the plaintiff. Mr. Schreiner and Mr. Graham for the defendant company.

This case which was to have been tried to-day before the Chief Justice and a jury, was, on the application of Sir T. Upington (to which Mr Schreiner consented), postponed till the 14th April. The names of thirty-six jurymen who had been summoned were read over and answered to; of these, twenty were struck off the list, and the remaining sixteen received notice to present themselves on the morning of the 14th April.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION.)

Mr. Schreiner, on behalf of the liquidators of the above bank, applied for an order confirming an arrangement which had been entered into with Mr. James Wroe, of Potchefstroom, who it appears owes the bank £3,000. Against this amount the liquidators hold securities to the nominal value of £1,321. The liquidators propose, in addition to these securities, to accept the sum of £900 in full discharge of Mr. Wree's indebtedness.

Confirming order granted as prayed for.

WRIGHT V. WILLIAMS.

This case, which had been postponed from the 11th inst., came on for further hearing.

Sir T. Upington, Q.C., appeared for plaintiff; the defendant in default. The action was for damages on the grounds of defendant's alleged fraud and misrepresentation.

Captain John Spence stated that he was the agent of Daniel de Pass, and knew both plaintiff and defendant. He had given evidence in the former case, which had been tried before Mr. Justice Smith, Williams had no authority from him to enter into a contract with defendant with

regard to the "lay," his authority only extended to the question of wages. He had been summoned to produce all documents in his possession relating to the engagement of seamen. Witness then explained to the Court that formerly mates in the service of Mr. De Pass used to receive £2 a month and "lay," and ordinary seamen £1 a month and "lay." This system of paying the men was found not to answer, and the present system was then adopted, under which all men employed by the firm receive monthly wages, and are not entitled to "lay" unless they have been specially recommended for it, and then it is only given as a gratuity. The plaintiff had been very unfavourably reported upon by Captain Williams, but on witness's suggestion his wages, and an ordinary seaman's proportion of "lay," amounting in all to about £38, were offered to him, but would not be accepted, the plaintiff claiming £72. Plaintiff then brought an action against De Pass for £72, but only got judgment for £23 odd, the Court holding that as no mention had been made of "lay" in the shipping articles, plaintiff was only entitled to his actual wages.

Sir T. Upington, addressing the Court on behalf of the plaintiff, contended that there was perfectly clear evidence that the defendant had fraudulently induced the plaintiff to enter into a contract which he (defendant) had no authority from De Pass & Co. to make. Counsel in his argument referred to the cases of "Cellen v. Wright," 7, E. & B. 301, "Cherry v. The Colonial Bank of Australasia," 3, P.C.R. 24, and "Richardson v. Williamson," 6, Q.B. 276, and submitted that under all the circumstances of the case plaintiff was entitled to judgment.

The Chief Justice remarked that the Court laboured under a certain amount of difficulty, owing to the absence of the defendant, who might be able to put quite a different complexion on the whole matter. Under the circumstances the Court would take time to consider.

SUPREME COURT.

THURSDAY, FEBRUARY 26.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

PROVISIONAL ROLL.

EXECUTORS OF DE KLERK V. DE KLERK.

In this matter, which was before the Court on the 5th February, provisional sentence was refused on the grounds that the defendant had denied his signature.

Sir T. Upington, Q.C., on behalf of the executors, now moved for provisional judgment on a mortgage bond for £3,500.

Mr. Juta opposed the motion.

It appeared from the affidavits read by counsel that a certain farm known as Kafir's Kraal, situated in the district of Victoria West, had been sold by Jan Abraham de Klerk to his son, Johannes Abraham de Klerk, and a mortgage bond in respect of this transaction had been given by the son, who now contended that the farm had never been sold to him, that he had signed the bond in ignorance, and finally that there had been no consideration for the bond.

The Chief Justice, on the conclusion of the argument, said there was no doubt there had been a mistake in transferring to Jan Abraham de Klerk the father, instead of to Johannes Abraham de Klerk, the son. The latter had had consideration, for he had been living on the farm, rent free, from 1884. He also pointed out that "Jan" was Dutch, and "Johannes" was the ancient Latin form of the same name, therefore they were practically one. In an endorsement of the bond by the father, he found that on account of the depressed condition of the Colony the father had directed that his son was not to pay interest on the bond. The case had been postponed until to-day, because the defendant had denied his signature. Now he admitted the signature, but said that he did not understand its meaning. He thought the explanation was wholly unacceptable. It was quite clear from the power-of-attorney that he treated the property as his own, and that he passed the bond for £3,500 by which the property was mortgaged. It appeared that the bond covered cash advanced, which was the reason why it amounted to £3,500, more than the purchase price of the property itself. The only point made by the defendant was the fact that the father had himself made an application to the Government for an adjoining piece of land, in which application he treated the land as his own. The father unfortunately was dead. Mr. Juta contended that his client's name was Jan, and the transfer was in favour of Johannes. Well, the two names were virtually the same. The executors did not claim the land on behalf of the father's estate, and they were now prepared to relinquish all right to it, and on this condition provisional sentence would be granted against the defendant, property to be executable.

IMPEY, WALTON AND CO. V. EDGAR PERKINS.

On the application of Mr. Tredgold, provisional judgment was granted for the sum of 21 5s. 3d.

REHABILITATION.

On motion from the bar, the rehabilitation of Eliza Bloam was granted.

THE PETITION OF JOHN LEVATT.

On the application of Mr. McLachlan, permission was granted to applicant to sue *in forma pauperis* in an action against his wife for divorce.

IN THE INSOLVENT ESTATE OF JAN H. ENGELBRECHT ACKERMANN.

Mr. Graham moved for authority to the Master to take proceedings for the appointment of a new trustee to the said estate, in order to cancel a bond which had been paid off, or for the Registrar of Deeds to cancel such bond.

The Court granted the order empowering the Master to take proceedings for the appointment of a new trustee.

WILSON V. WILSON AND ANOTHER.

On the motion of Mr. Juta, the Court made absolute the rule *nisi* admitting the applicant to defend *in forma pauperis* the action for divorce instituted by her husband.

VAN ZYL AND OTHERS V. EXECUTRIX DE BEER.

Mr. Searle appeared for the applicants, and Mr. Schreiner for the respondent.

This matter, which was an application for an interdict to restrain the respondent from obstructing the flow of water in a furrow leading from the farm Matroosfontein to Wittedrift, in the district of Piquetberg, was, with consent of counsel on both sides, ordered to stand over till the 12th March.

IN THE INSOLVENT ESTATE OF CHRISTOFFEL J. VILJOEN.

Where the Court has appointed a Provisional Trustee the appointment will not be set aside unless at a meeting of creditors one or more trustees are elected.

This was an application by Mr. Searle for the appointment of Mr. Henry Nutall Chase as co-trustee with Mr. Harry Gibson.

Mr. Schreiner, who appeared for the provisional trustee, Mr. Harry Gibson, opposed the application.

The Chief Justice, in giving judgment, said there seemed to him to be no special circumstances to justify the Court in departing from the established practice. Upon the last occasion the impression on his mind was that if a fresh election were ordered trustees would be elected, and that there would be a majority in number as well as in value for one or more trustees. The result was different. The ordinary rule was for the Court to authorise a provisional trustee to finally administer the estate. There were no special circumstances to justify the Court in departing from that rule. Mr. Gibson lived in Cape Town, but the estate was not a large or difficult one to administer. Certainly the case showed that in future the Court should make some inquiries before appointing a provisional trustee, and he was bound to say that if Mr. Chase had also applied when the provisional trustee was appointed, the Court might have given preference to him. However, as Mr. Gibson had been appointed, the rule would be adhered to, Mr. Chase to pay costs of the day.

DUNA V. SABENKOLA AND ANOTHER.

Mr. Schreiner appeared for the applicant; Mr. Juta for the respondent; and Mr. Giddy for the Resident Magistrate of Glen Grey (Mr. Jenner). This was an application to show cause why an action adjudicated upon by the Resident Magistrate of Glen Grey should not be brought under review of the Supreme Court on the ground of irregularity and non-jurisdiction.

Mr. Schreiner suggested that as the record was before the Court the case might be heard as though under review.

Mr. Giddy remarked that he was not at present prepared to argue the case on its merits.

The matter was allowed to stand over.

VAN HEERDEN V. THE VICTORIA WEST MUNICIPALITY.

On appeal from the Resident Magistrate of Victoria West.

Ordered to stand over.

ROSSOUW V. ROSSOUW.

Mr. Castens having obtained an order making absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, called the plaintiff, who stated that she was married to the defendant, François Albertus Rosseuw, in 1875, at Robertson. After having lived with plaintiff for six years, the defendant deserted her, and was, she understood, at present living in Barberton. She had frequently written to her husband asking him to return, but he had taken no notice of her letters.

In answer to the Court, the witness stated that she wished to retain the custody of the four children, the issue of the marriage.

The Court granted a rule *nisi* calling upon the defendant to show cause why he should not return to his wife or receive her on or before the 1st of May, failing which to show cause on the first day of next term why a decree of divorce should not be granted.

HULBERT V. CAPORN AND MARRIOTT.

Goods—Purchase—Repudiation by buyer.

Mr. Schreiner and Mr. Sheil for the plaintiff.
Mr. Juta and Mr. McLachlan for the defendants.

This was an action instituted by Messrs. Hulbert & Co., mantle, trimming, and umbrella manufacturers of Wood-street, London, against Messrs Caporn & Marriott, linendrapers, of Plein-street, Cape Town, for £148 12s. 6d., balance of account.

The defendants denied that they had purchased certain 102 garments described in the invoices as "Garricks," and tendered £89 8s. 9d., the balance of account less the cost of the "Garricks" and the expenses connected with importing the same.

The evidence of the plaintiff's witnesses, which was taken on commission in London, having been read,

Mr. Juta called Mr. Arthur Leeson Caporn, who stated that he was in London in September, 1889. His brother and himself went to Messrs. Hulbert & Co.'s establishment in Wood-street, and were there introduced to Mr. Nisbit, the manager of the mantle department. He bought several parcels of goods, including a number of "Visites," but he never ordered any "Garricks," in fact, he did not know what they were until he had opened the cases. He met Mr. Tipper in June, 1889, on the voyage to England. He made an appointment with Mr. Tipper on the same day that he had bought the goods from Hulbert & Co., and brought him to look at his purchases. Mr. Tipper said the goods were all right. He left England in the Nubian on the 13th September, and arrived in Cape Town on the 7th October. The goods arrived a month or so after. When the cases were opened he saw the "Garricks" for the first time. He gave instructions to have them placed on one side, and directed that they should not be marked or shown in the windows. Mr. Tipper called at his shop in January. He rejected the "Garricks," because he had not ordered them, and besides they were old-fashioned, and unsuited for the South African market. He made an entry of the goods he had bought from Hulbert & Co. in his pocket-book, but he had lost this book, he thought, at a furniture sale. He had never heard the terms "Garricks" applied to mantles.

Cross-examined by Mr. Schreiner: His brother might have heard the word "Garricks," but he (witness) did not. He might have looked at fifty samples the day he was at Hulbert & Co.'s warehouse. He had kept other articles which he had not ordered. He purchased a large number of "Visites" to clear. There were other customers buying on the same day. The mantles produced are the same as those sent to England. (At this stage of the proceedings considerable amusement was caused in court by the production of a number of the "Garricks" and "Visites," some of which were fitted on by one of the lady witnesses.) The ten mantles which he had bought he showed to Mr. Tipper. He simply bought the mantles as garments without any specific name being given to them. These ten mantles had been sent up-country, he thought to Bloemfontein. He could not say when the first lot of goods arrived. They might have come to hand on the 26th November. When goods arrived they were immediately cleared, and sometimes kept for months in the store before they were opened. He agreed to give a six months' bill for the first parcel of goods, the second was an open account. He was of opinion that the "Garricks" had been wilfully packed into the cases. He thought he lost his pocket book at a sale of furniture. He did not look for the book until he had received the plaintiffs' letter. —Re-examined by Mr. Juta: the ulsters were invoiced as ulsters. "Toscos" were small capes covered with beads.

Mr. Loton Tipper, examined by Mr. Juta, corroborated the statements by last witness with regard to seeing the goods that had been purchased from Hulbert & Co. He could not remember having seen the "Garricks."

Miss Bywater and Miss Hastings, assistants in Messrs. Caporn & Marriott's establishment, were also examined, and expressed their opinion that the "Garricks" were antiquated and unsaleable. The latter lady volunteered the information that she had seen a similar garment worn by her grandmother.

After hearing counsel, the Chief Justice intimated that the Court would take time to consider whether they would require to hear any further arguments.

SUPREME COURT.

FRIDAY, FEBRUARY 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS, Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

HULBERT V. CAPORN AND MARRIOTT.

Mr. Schreiner and Mr. Sheil for the plaintiffs.
Mr. Juta and Mr. McLachlan for the defendants.

Mr. Juta having concluded his address to the Court,

The Chief Justice, in giving judgment, remarked that there had been a great conflict of testimony in the case. The evidence of plaintiff's witnesses given on commission in England, was quite consistent with the facts of the case, whereas the evidence of the defendants and their witnesses did

not agree. Under these circumstances he was of opinion that the probabilities were all in favour of the plaintiff. Judgment would therefore be for the plaintiff for the full amount claimed with all the costs incurred both in the Colony and in England.

BOOSE V. WOODHEAD AND OTHERS.

Libel — Damages — Company — Meeting of shareholders—Directors' Report—Publication.

Mr. Juta and Mr. McLachlan for the plaintiff.

Mr. Schreiner and Mr. Graham for the defendants.

This was an action for libel, instituted by Mr. Frederick Henry Boosé, until recently secretary of the Cape Town Stock Exchange and Investment Company (Limited), against Mr. John Woodhead, Mr. William F. Simkins, Mr. John Ross, Mr. George Behr, Mr. Melt Roux, and Mr. John Scott, directors of the above-named company. Damages were laid at £500. It appeared, from the opening statement of counsel, that on the 28th March, 1890, a meeting of the directors and shareholders of the Stock Exchange was held, and at this meeting a certain report was read, and afterwards published in the *Cape Times* and *Cape Argus*. This report, the plaintiff contended, contained the libel complained of, the libellous words being to the following effect: "Your directors in taking this course have not dismissed him (meaning the plaintiff) principally upon the charges above referred to, but consider that Mr. Boosé, in dealing illegally with the funds of the company, not only justified them in taking this measure (meaning plaintiff's dismissal as secretary), but they have instructed their solicitor to place the papers in the hands of the Attorney-General, from whom they expect to hear daily."

The defendants admitted the publication complained of, but pleaded that the occasion was privileged, that the publication was made without malice, and in the *bona fide* discharge of their duties as directors, that it did not bear the construction put upon it by the plaintiff, and that it was true in substance and in fact.

Frederick Henry Boosé, the plaintiff, examined by Mr. Juta, stated that he was the promoter of the Stock Exchange, and as such the directors voted him a salary of £600 per annum, and 100 fully-paid-up negotiable shares of the company. The Exchange was carried on in 1889 and 1890, having been started in February, 1889. In the early part of 1890 certain complaints were made against witness by Messrs. Scott & Armstrong, and the matter came to the notice of the directors.

Mr. Schreiner here asked the ruling of the Court as to alleged charges made against the plaintiff, other than the alleged libel complained of.

Mr. Juta said he should refer to them for the purpose of proving malice.

The Court ruled the evidence to be admissible and intimated that Mr. Schreiner could bring refuting evidence.

Witness (proceeding) said a resolution was passed calling upon him to withdraw certain statement respecting Messrs. Scott & Armstrong, and stating that the directors exonerated him from intent to damage the interest of the company or anyone.

Mr. Schreiner pointed out that there was a record on the minutes that the plaintiff did apologise and retract.

Witness said he received no negotiable shares, although he was given 100 reserves. The shareholders, however, objected, and he returned them in March, 1890. The account book of the company was here produced, and witness said he had kept the book Early in January, 1890, about the time of the annual meeting, a resolution was passed by which it was proposed to give him a "good-for" for 100 shares, equivalent to those voted him on the formation of the company. He did not get the "good-for," but got 100 negotiable shares in the company, which, as he had stated, he afterwards returned. He accepted them under protest, as he should have had them earlier. They were worth nothing practically when hegot them. In February, 1889, they were worth £1 each, and went up afterwards to 67s. 6d.

Mr. Juta remarked that he might simplify the case by stating that the whole case turned upon the fact that plaintiff drew money against the value of the shares he was about to receive, and posted it in the books, and it was upon this action that the directors based their allegations. Plaintiff's contention was of course that he should have had the shares earlier.

Witness (preceeding) said that the company was financed as best it could be, because it had no funds. The account at the bank was overdrawn by £1,800 in October, 1889. They could overdraw to that amount. Witness therefore had to finance the business out of the bar takings and the subletting of Reuter's cables. The £5,000 of the paid-up capital was lost in speculation. The directors over-speculated.

The Chief Justice: Who was the company's speculator?

Witness: Mr. Melt Roux, my lord. (Laughter). But for witness's management the company would have gone into liquidation long ago. The Investment Branch was a subsidiary company, the directors of which were also the directors of the Stock Exchange. (Laughter). They used to borrow from the subsidiary company. On December 14, 1889, his account of £100 or 100 shares, after having been transferred from one account to another, was put on the profit and loss account. This was done by witness.

The Chief Justice: Did you get the money?

Witness: I got £90.

The Chief Justice: And the remaining £10?

Witness: That is still standing to my credit. (Laughter).

The Chief Justice: Did they know you had the £90?

Witness: I did'nt consider it necessary to tell them.

Mr. Justice Buchanan: Where did you get it from?

Witness: Out of the takings.

Mr. Justice Buchanan: Not by cheque?

Witness: We couldn't draw a cheque. (Laughter.)

Mr. Justice Smith: In point of fact, all debts were paid out of the takings of the bar?

Witness: We satisfactorily sub-let our cable. The business was conducted on cash principles as regarded receipts and payments after the overdraft had been made.

Mr. Schreiner: Not much payment.

Witness (continuing) said Messrs. Eilenberg & Boalch made certain charges against him, not connected with money matters, but respecting his fidelity as secretary to the company.

Mr. Schreiner again raised the question of the admissibility of other charges than the alleged.

Mr. Juta said he should prove by them that there was malice. In point of fact, the directors wanted to get rid of plaintiff, and appoint someone else.

The correspondence was then put in, from which it appeared that the charges were that plaintiff had attempted to establish another Exchange whilst he was secretary of the company, had solicited support from the shareholders, and had generally falsely represented the financial position of the company, and tried to damage its credit.

Witness produced the scrip of the shares accepted by him under protest. They were valueless. He was suspended on March 5, 1890. Subsequently he received a letter making a charge of fraud and dishonesty, and calling upon him to refund the money, to which he replied requesting an adjustment of the account between them in respect of the shares, and asking for certain information from the books, without which he could not reply in full. Extracts were supplied him after the shareholders' meeting on the 28th March, 1890. About this time he was not on friendly terms with Messrs. Scott & Roux on account of what he considered their underhand dealings as regarded the company and dealings in shares. The result of the slanders upon his character had had the effect of keeping him out of permanent employment.

Cross-examined by Mr. Schreiner: At present witness was in the employ of Mr. Du Preez. Would not say that entries of receipts and payments were made at once. The books were posted every week. The entry of £90 was made early in February. The money was drawn in January. The books had never been out of the possession of the company. The slip of paper produced related to the £90. The auditors did not take the books away. On the 27th January, 1890, the auditors did not question the item of £100 credited to witness. Mr. Lippert knew he had withdrawn £90, but no one else knew until he told Mr. Ross. He did not beg Mr. Ross not to mention it, nor did he ask him to lend him £90 to make it up. He made no reference to getting value for his shares for ten months. Mr. Schreiner was proceeding to cross-examine witness upon the accounts, when.

The Chief Justice asked if he were going to prove want of malice?

Mr. Schreiner: It is proved that there was every reason to come to the conclusion that Boese's conduct required the censure put into the report.

The Chief Justice thought that on the plaintiff's own evidence there was no proof of malice. The communication was privileged, and the only question that had to be decided was whether the publication in the newspapers was by the order of the defendants, or if it were, whether there was malice or not? He was somewhat surprised at Mr. Juta going into such details as he had. He should have thought he would only have proved the libel. There was no plea of justification.

Mr. Justice Smith: You want to prove that this gentleman drew £90 without authority, and that is proved over and over again.

Cross-examination continued: The £90 was shown by him on a certain account to be £40 for salary and £50 for shares, although he admitted that when he was suspended nothing was due to him for salary.

Mr. John Henry Blenkin stated that he was a reporter on the staff of the *Cape Argus*. He remembered attending the meeting of the 28th March, when he was informed that it was private, and that reporters would not be admitted. He was subsequently sent for, but he did not hear the report read. The report was handed to him by either Mr. Woodhead or Mr. Twycross, and was afterwards published.

Mr. Cornelius Bartholomew, a reporter on the staff of the *Cape Times*, corroborated the evidence of the last witness.

Mr. P. O'Dowd stated that in his opinion the directors were opposed to the publication of the report.

Mr. Henry J. C. Ross stated that he would have taken the plaintiff into partnership were it not for the publication of the report.

The Chief Justice: Has the plaintiff suffered much loss by your not having taken him into partnership?

The witness, after some hesitation, stated that he had.

Mr. Schreiner then submitted that the newspapers, and not the directors, were liable for the libel.

The Chief Justice observed that it was open to them to object at the meeting to the publication of the report, and they did not do so. He further remarked that, under any circumstances, the plaintiff could only recover nominal damages, as the libel had been sufficiently published before it got into the newspapers.

Mr. E. R. Syfret having given evidence as to the auditing of the company's books,

Mr. Schreiner called Mr. John Ross, one of the directors, who detailed the circumstances under which the company was established, and gave the substance of a conversation which had taken place between himself and the plaintiff relative to the £90. Witness was positive that plaintiff had asked him not to mention the £90 transaction, and that he (plaintiff) had asked witness for a loan of £90 to replace the money which he had taken.

The other directors having been examined, and counsel having addressed the Court,

The Chief Justice remarked that it was evident the plaintiff had sustained no damage by the publication of the report. But even if he had suffered damage, judgment could only be given against the director who had authorised the publication of the report. There was evidence that Mr. Woodhead had handed the report to one of the reporters. Judgment would be for the plaintiff against the first-named defendant for one shilling damages, each side to pay its own costs.

SUPREME COURT.

SATURDAY, FEBRUARY 28.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

BOOSE V. WOODHEAD AND OTHERS.

The Chief Justice said there must be some addition to the judgment which was given yesterday against Mr. Woodhead for a shilling, each party to pay his own costs. There must be some judgment in regard to the other defendants, and it would be of "absolution from the instance," but the rest of the order would of course stand, namely, that each party pay his own costs. The judgment was somewhat hurriedly given, and he wished to make it perfectly clear that the reason why the other defendants were absolved was this: It was really a meeting of shareholders that was held, and a majority of shareholders decided to admit reporters, and so far as the proceedings were concerned which took place at the meeting, he believed that all the directors would be liable, because they, knowing that it had been decided to be public, ought to have objected to the report being read. But the charge in the declaration was not publication at that meeting but in the *Argus* and *Times*, and in respect of the publication in those newspapers the evidence showed that the chairman of the shareholders' meeting was the gentleman who handed it over to the reporters, and the remaining directors were not responsible.

IN RE SCHEEPERS.

Clerk articled to Attorney—Application for admission refused, applicant not having passed the whole of his time under the immediate supervision of his principal.

Mr. Schreiner moved for the admission of Mr. Jacobus Johannes Scheepers as an attorney-at-law.

It appeared from an affidavit read that the applicant was duly articled to Mr. Attorney Van Heerden, of Burghersdorp, in January, 1888, and that he had served for the period required with the exception of four months, during which time he had managed Mr. Van Heerden's business at Venterstad.

Mr. Schreiner asked that the period spent at Venterstad by the applicant might be included in that passed in Burghersdorp under his principal's more immediate supervision.

Mr. Searle, who appeared for the Incorporated Law Society, did not offer serious opposition, but remarked that the society did not like cases of this kind to be afterwards quoted as precedents.

The Chief Justice said that if they granted this application it would certainly form a precedent.

The Court suggested that the applicant had better complete his service with Mr. Van Heerden at Burghersdorp.

DANIEL H. W. WESSELS V. JOHANNES BASSON.

On the application of Mr. Graham, provisional sentence was granted for the sum of £200, with interest from the 18th July, 1890.

TRUSTEE ZULU BISHOPRIC FUND V. GERT H. J. KRUGER.

Mr. Maskew moved for provisional sentence on a mortgage bond for £630, with interest from 1884. Provisional sentence granted, and property declared executable.

FRANCIS J. WEBSTER V. MARY AND HENRY SOLOMON.

On the motion of Mr. Searle, provisional sentence was granted for £230 6s. 8d., balance of rent due.

OMARURU GOLD-MINING AND EXPLORATION COMPANY V. ISIDORE HIRSCH.

On the application of Mr. Shiel, previsional judgment was granted for £82 10s., and interest *a tempore moræ*, being the amount of six unpaid calls on 110 preferent shares in the above company.

JOHAN VAN B. GASSLER V. POPPE. RUSSOUW AND CO.

On the motion of Mr. Molteno, provisional judgment was granted in terms of consent.

ASSIGNEES MYBURGH AND CO. V. EX ESTATE J. F. DU TOIT.

On the application of Mr. Juta, order for sequestration was granted.

F. C. GERICKE V. JOHAN C. G. H. LAMPRECHT.

Postponed until 12th March on the application of Mr. Juta.

REHABILITATIONS.

On motion from the Bar the rehabilitation of the following insolvents was granted: Pieter Johannes Marais, David Roux, Albertus Petrus Bernhardus van Niekerk, and Walter Moorcroft Edwards.

GENERAL MOTIONS.

DUNA V. SABENKOLA AND ANOTHER.

Ordered to stand over until Monday.

IN THE MATTER OF THE MINOR JOHANNES A. BOTHA.

On the motion of Mr. Schreiner, an order of Court was granted in terms of the Master's report, and permission was given for the sale and transfer to the minor of certain landed property called Vrendenberg, situated in the district of Fraserburg.

PETITION OF MARGARETHA A. RICHARDS.

Mr. Tredgold moved, on behalf of applicant, for leave to sue *in forma pauperis* in an action to be instituted by her for restitution of conjugal rights.

Matter referred to counsel for his certificate.

PETITION OF ANNA J. FOURIE.

Mr. Molteno moved to make absolute the rule *nisi* authorising the payment to petitioner of a sum of money, awarded to her husband out of the estate of his late father.

Order granted; money to be paid personally to applicant, and costs to be paid out of husband's share of the estate.

IN RE THE MINOR EBDIN KEMPER.

Mr. Juta moved for authority to the Master to continue certain quarterly payments towards the maintenance and education of the minor out of the funds devolving upon him from the estate of his grandparents. Counsel stated that the minor went Home some time ago to study mining. He had £15 per quarter out of a sum of money which became exhausted. Since then £100 had been placed to his credit, out of which payments would be continued.

The Court granted the order.

IN THE MATTER OF THE UNION BANK, IN LIQUIDATION.

On the application of Mr. Schreiner, certain compromises submitted to the Court with the liquidators' petition were confirmed.

THE UNION BANK, (IN LIQUIDATION,) IN THE ESTATE OF THE LATE F. W. HOFMEYR.

Company—Bank in liquidation—Contributories — Deceased shareholder — Mutual will—Partnership—*Condictio indebiti*—It is not safe or proper for an executrix to pay to herself as surviving spouse any portion of the common estate until her husband's shares in an unlimited company have been transferred or the liability entailed by their retention has been ascertained and provided for.

Mr. Schreiner moved for authority to the official liquidators of the above bank to place upon the list of contributories in respect of thirty shares registered in the name of the said estate the name of the widow, now married to one Kiver.

Sir T. Upington, Q.C., opposed the motion on the grounds that Mrs. Kiver had never been a shareholder in the bank, and contended that as the community which had existed between herself and her late husband was dissolved, upon his death; she could not be held liable for debts which had not accrued prior to the date of dissolution. The shares after the liquidation remained in the estate of late F. W. Hofmeyr, and the liquidators could have no remedy against the widow, except in action for damages.

Mr. Schreiner, on the other hand, contended that the widow was as much a holder of the shares as her late husband, and was consequently liable *in solidum*.

After hearing the argument, the Chief Justice intimated that the Court would take time to consider their judgment.

Postea (March 12.)

The Chief Justice delivered the following judgment: The late F. W. Hofmeyr was the registered owner of thirty shares in the Union Bank. By the mutual will of himself and his wife, to whom he was married in community of property, the survivor and the children of the marriage were appointed heirs of the first dying, with liberty to the survivor to retain the minor children's inheritance under his or her administration. The testator died in 1881, leaving a minor child, Petronella, the issue of the marriage. The survivor, as executrix, thereafter filed an account of her administration, by which she awarded to herself the sum of £1,547 9s. 9d., being a moiety of the estate and a child's portion, and the sum of £773 14s. 10d., being one-fourth of the net assets, to her child. On the account there is a note to the effect that "thirty Union Bank shares are at present unsaleable," and the shares still stand registered in F. W. Hofmeyr's name. The bank having been ordered to be wound up in 1890, the applicants, as liquidators, placed the estate of Hofmeyr upon the list of contributories, but, as there are no assets remaining in the estate, nothing has been awarded to them. They now apply for an order placing the name of Mrs. Hofmeyr, who has since married Mr. Kiver, upon the list of contributories for the full amount of the calls, and directing the payment to the liquidators of the one-fourth share of Hofmeyr's estate, which has been awarded to the daughter, but which is still under the administration of Mrs. Kiver. It has been decided by this Court in the case of Torbet v. Executors of Attwell (Buch. 1879, p 195), that, under our law, differing in this respect from the Roman law, the death of one of two or more partners does not dissolve the partnership when the contract of partnership provides for its continuation for the benefit of the estate of the deceased partner. It is obvious that joint-stock companies, consisting, as they generally do, of a great number of shareholders would never be formed if the death of one of the shareholders were to put an end to the concern. The deed of settlement generally provides for the case of the death of any shareholder, and even where such provision does not exist, the test of ownership of shares, and therefore of partnership in the concern, is always registration of the name of the owner on the list of shareholders. The seventh article of the deed of settlement of the Union Bank recognises the right of an executor to hold, in that capacity, the shares of a deceased person whose estate he has been appointed to administer, and the 18th and 15th articles make the registration of shares in the name of the owners the test as to the rights and liabilities of ownership. To the contract embodied in these articles the late Hofmeyr became a party when he became the duly-registered holder of the thirty shares now in question. He must be taken to have agreed that until the shares should be transferred to someone else he or his estate should continue in the partnership with all the rights, and subject to all the liabilities which such a continuation would involve. Creditors dealing with the bank after his death were entitled to regard his estate as liable for the debts and engagements of the bank, and were justified in giving credit to the bank upon the faith of his estate being subject to all the liabilities of shareholders. Upon the winding up of the bank the liquidators were justified in placing his estate, as represented by his executrix, upon the list of contributories, and if she had any assets left in her hands there can be no doubt as to the right of the liquidators to share in those assets for the payment of the calls which the Court has authorised. The first respondent, however, had already, before the winding up commenced, distributed the assets of Hofmeyr's estate of which she was the executrix. One-half of the net assets had been awarded to her in right of her marriage in community to him, and the other half had been equally divided between her and her daughter, the second respondent, as being the testamentary heirs of the deceased. Her rights and liabilities as surviving spouse must be considered separately from the rights and liabilities of herself and daughter as testamentary heirs. Until the community of property between Hofmeyr and his wife was dissolved by his death he had the sole administration of the common estate, and upon his death that common estate was liable for all debts incurred by him before and during the marriage. The applicants seek to make the first respondent liable as contributory for the full amount of the calls on the thirty shares, but it is clear that, as the shares have never been transferred to her, she cannot be held liable, in her individual capacity, as a contributory. The more difficult question is, whether she is liable to the creditors of the estate for a greater sum than she has actually received as surviving spouse. It may fairly be urged on behalf of the liquidators that the cause of the ultimate debt originated during the subsistence of the community, and that therefore she remains liable for one-half of that debt, although it was really incurred after the dissolution of the community. According to Voet (23, 2, 84), "it is sufficient, in order to create a community of profit and loss by virtue of the marriage in community, that the cause of the profit or loss has originated before or during the subsistence of the marriage, although the profit or loss, as the case may be, should only accrue after the dissolution of the marriage." Upon this principle the

first respondent was fairly entitled, as against the heirs of the deceased, to receive, as she did receive, one-half of the dividends on the thirty shares, but upon the same principle she cannot, as between herself and the heirs, evade liability for one-half of the loss occasioned by the failure of the bank. The question is, whatever may be the rights of the heirs in the course of administration, whether the creditors of the estate have any claim beyond the common estate of Hofmeyr and his wife? In the case of Brink v. Louw (1 Menzies 210) the husband had, during the community, entered into a suretyship for which he became liable, and had afterwards surrendered his estate as insolvent, and it was held that his surviving spouse, not having repudiated her interest in the common estate, could be sued for half the amount of the suretyship debt. She had received nothing out of the common estate, and yet was held liable for one-half of the debts incurred by her husband. But the debt was not, as in the present case, unascertained and contingent at the time of her husband's death, nor was his liability dependent upon registration in his name. In the present case the shares were never registered in the first respondent's name, and the creditors, therefore, had no recourse against her individually as shareholder. Their recourse was only against the common estate, which, at the time of Hofmeyr's death, was under his administration, and was liable to the payment of his debts. On the other hand, until those debts, whether payable *in præsenti* or *in futuro*, were satisfied, his surviving spouse had no just or valid claim against the common estate for her half-share of the net assets of the community. It was not, therefore, safe or proper for her, as executrix, to pay to herself as surviving spouse any portion of the common estate until her husband's shares in an unlimited banking company had been transferred, or the liability entailed by their retention had been ascertained. These shares having been acquired by her husband during the subsistence of the community, it was impossible to say what the value of the common estate was, so long as the shares remained in his name. The event proved that the estate was valueless. She might have prevented the deterioration of the estate by realising the shares, and this indeed it was her duty as executrix to do. There is a note on the account that at the date when it was framed the shares were unsaleable, but there is no statement on oath from her or anyone else that they could not have been sold between the date of the husband's death and the winding-up order. *Prima facie*, therefore, it would appear that she had no just or valid claim against the common estate as surviving spouse, and that she was not justified, knowing as she did that the shares remained unsold, in awarding to herself any portion of that estate. The first respondent is also one of the testamentary heirs of her husband, and in this respect she stands on the same footing as her daughter. As heirs they have received their moiety of the common estate. That moiety, however, could not be ascertained so long as the shares remained unsold and untransferred, and the executrix ought not to have paid it out to herself and her daughter, as heirs, until the continuing liability of the estate had been satisfied. The next question is, what remedy is open to the liquidators? I have already remarked that the first respondent cannot be placed on the list of contributories in her individual capacity, and we are not asked to place the second respondent on the list. The first respondent has already been placed on the list in her capacity as executrix, so that the liquidators are judgment creditors of the estate for the amount of the call, namely, £4,500. Her answer to the application for judgment is that she has fully administered the estate, and that she has no assets as executrix to meet the call. In view of the order which I propose to be made it would not be expedient for the Court to state definitely at this stage whether the answer is sufficient or not; but I am clearly of opinion, for the reasons already given, that there are sufficient grounds for calling upon her to show cause why she shall not be ordered to pay the sums awarded to herself and her daughter *de bonis propriis*. In making no order against the first respondent as surviving spouse, and against her and the second respondent as heirs, I do not wish to be understood as holding that they are not liable to refund at the suit of the liquidators. They cannot be placed upon the list of contributories in their individual capacity, but if they are liable to refund at the suit of the executrix, there is authority for holding that they are subject to the same liability at the suit of the creditors of the estate. Voet (12, 6, 10) points out several instances in which the *condictio indebiti* may be instituted by persons other than those by whom or in whose name the payment had been made. He says, for example, that if the tutor of a minor has paid some of the creditors in full, and it is afterwards discovered that the estate is insufficient to pay all the creditors, the unpaid creditors may proceed against those who have been paid for a refund of a proportionate share. The proviso of the 82nd section of Ordinance 104 impliedly recognises the general right of unpaid creditors of the estate of a deceased person to sue a creditor who has been improperly paid, although it takes away that right where such unpaid creditors have failed to lodge their claims with the executor in due time. That proviso does not, in my opinion, affect the question whether or not creditors may recover restitution from heirs or legatees, or even from persons who have been paid as creditors, but had not, in

the language of the ordinance, any "just and valid claims against the estate." Such restitution, however, should be sought by action, and not by motion. The present application, in the form in which it has been made, must be refused, but as the first respondent's name has been properly placed on the list of contributories, in her capacity as executrix, the Court will grant a rule *nisi*, calling upon her to show cause on the last day of next term why she shall not be ordered to pay *de bonis propriis* in respect of the calls made on the thirty shares, the sums paid by her as executrix to herself as surviving spouse, and to herself and her daughter as testamentary heirs, and to pay the costs of this application.

MORTON V. MORTON.

This was an action for divorce, instituted by the plaintiff, the husband, by reason of his wife's adultery.

Mr. Giddy, who appeared for the plaintiff, read the evidence which had been taken on commission in England.

The Court, after having heard the evidence, granted the decree of divorce as prayed for.

PETERS V. PETERS.

On the application of Mr. Jones, this case was allowed to stand over till the 12th March.

HEYDENRYCH V. SALOMON & MCLOUGHLIN.

Debt—Judgment—Stay of execution—Refusal of Magistrate to take evidence as to ability of defendants to pay more than amount tendered. Appeal — Judgment amended by striking out stay of execution. Leave given to Respondents to produce further evidence.

On appeal from the Resident Magistrate of Cape Town Mr. Graham appeared for the appellant (the plaintiff in the Court below). This was an appeal from the judgment of the Resident Magistrat of Cape Town. The respondents (the defendants in the Court below) had admitted the debt—£48, and judgment was given against them, but execution stayed on their paying £1 a month, the Magistrate refusing to take evidence as to the ability of the respondents to pay more than £1 a month.—Mr. Graham contended that the Magistrate was not justified in rejecting evidence on the point submitted; that the case was on all fours with that of "Le Roux v. Hofmeister" (heard in the Supreme Court on the 2nd December, 1890), and prayed that it might be remitted.

Mr. Justice Buchanan: What is the use of remitting the case? The Magistrate may take further evidence and confirm his judgment.

Mr. Graham: We can produce evidence to show that the respondents can pay more than £1 a month.

The Court amended the judgment of the Resident Magistrate by striking out the stay of execution. Leave would, however, be given to the defendants to produce evidence of their inability to pay more than £1 a month. Costs were given.

SUPREME COURT.

MONDAY, MARCH 2.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice SMITH.]

HEYDENRYCH V. LANGERMANN.

Debts due to insolvent estate—Purchase of right to recover same—Partnership—Final statement of accounts.

Mr. Schreiner and Mr. Molteno for the plaintiff.
Mr. Searle and Mr. Graham for the defendant.

This was an action instituted by the plaintiff (Mr. Benjamin G. Heydenrych) against Mr. F. J. B. Langermann for the recovery of certain sums of money, amounting in all to £93 13s. 8d., alleged to be due by the defendant to the insolvent estate of H. P. du Preez, and the right to recover which had been bought by the plaintiff. It appeared from the opening statement of counsel that in April, 1882, an agreement was entered into between Mr. H. P. du Preez, Mr. C. M. de Wet and the defendant, by which the latter in consideration of his advancing the sum of £800 was to receive a fourth share of the net profits of the business. Disagreements appear to have arisen between Du Preez and the defendant, and in October, 1883, the defendant left the business, he receiving as his share £1,800, £800 in cash and bills extending over two years for the balance. According to plaintiff's statement, at the time defendant left the business of Du Preez he (defendant) had not accounted for certain sums of money which he had received, or which had been paid on his account; amongst these was a claim the firm had against one Lombard, of Malmesbury, for £72 3s. 6d., in full discharge of which defendant had accepted a share in the Malmesbury Board of Executors, but had not debited himself with the £72 3s. 6d. The defendant in his plea alleged that he had taken the share in the Malmesbury Board of Executors

with the full knowledge and consent of Du Preez and that the settlement under which he received £1,800 was final, and operated as a mutual release between the parties. Upon these facts issue was joined.

Mr. H. P. du Preez, examined by Mr. Schreiner, stated that in April, 1882, he engaged Mr. Langermann as financial clerk, but in consideration of his putting £800 into the business he was to receive a fourth of the net profits. Subsequently he had disagreements with the defendant, and the latter left the business on receiving £1,800. Witness had no knowledge whatever of the transaction with Lombard, and when defendant left the business he (witness) was under the impression that Lombard's account was still owing.

Cross-examined by Mr. Searle: He was anxious to get rid of Mr. Langermann, as he found that he (Langermann) was in the habit of speaking too much to outsiders about the affairs of the business. On 5th October, 1883, Mr. Louw advanced £1,500 to pay off Langermann It was not till witness had returned from England in April, 1886, that he became aware of the transaction with Lombard. He believed that Langermann had acted *bona fide* over the Lombard transaction, but he had failed to debit himself.

Mr. Benjamin G. Heydenrych, the plaintiff, examined by Mr. Schreiner, stated that he had bought the claims now sued on, at an auction held by Mr. Cauvin. Some of the debts had already been ceded to him, and he was second mortgagee of others, so that he was obliged to buy them to protect himself. He had liquidated Du Preez's business, and the affair of the Morganson Syndicate were chiefly in his hands.

In answer to the Court, witness said that he had bought the debts for £11 11s., and had only recovered some £2 odd.

Mr. J. R. Lancaster stated that he had a desk in Mr. Du Preez's office in 1881 and 1882. After Mr. Herron (the bookkeeper) became ill, he rendered some assistance in keeping the books. Langermann's account appeared in the private ledger, but he could find no trace of his being debited with the share in the Malmesbury Board of Executors.

In answer to Mr. Justice Smith, the witness stated it was not usual to have an ordinary clerk's account in the private ledger.

Mr. F. J. B. Langermann, examined by Mr. Searle, stated that the share in the Malmesbury Board of Executors was transferred to him with the full knowledge and consent of both Mr. Du Preez and Mr. De Wet, and he (witness) was under the impression that his account had been debited with the amount. Since he had left the business, Du Preez had never spoken to him of any debts which he owed to Du Preez's estate.

Cross-examined by Mr. Schreiner: Witness had never promised to contribute to any expenses in connection with the Morganson Syndicate. Du Preez had no authority to expend money on behalf of the syndicate. He was of opinion that the share in the Malmesbury Board of Executors was handed to him by Mr. Du Preez. Witness could not say if he had looked up his own account to see how he stood, and did not remember £5 8s. being paid for house duty on his account.

Re-examined by Mr. Searle: Witness thought he was entitled to more than he had received. He was mainly induced to enter the firm owing to a statement of Mr. Herron that the profits during the preceding year had been £6,000.

Mr. T. J. Louw stated that in 1883 he entered into partnership with Du Preez, and put £1,500 into the business to buy Langermann out. When he had been about six months in the business he ascertained that Langermann had not been paid. Witness was under the impression that he had handed Lombard's share in the Malmesbury Board of Executors to Du Preez. The share was then worth £35.

J. G. Mocke, examined, stated that he was one of the Morganson Syndicate. He had never authorised Mr. Du Preez to spend any money on behalf of the syndicate. He knew that Langermann had spent money on the syndicate, and he (witness) had spent about £1 10s.

Cross-examined by Mr. Schreiner: The speculation had turned out successfully; each member of the syndicate got 630 shares when the company had been floated, and he had sold 300 of his shares at a profit.

Mr. Schreiner having addressed the Court,

The Chief Justice said that no rule was clearer in our law than that the cessionary could have no greater rights than the cedent. Had this action been brought by Mr. Du Preez it would most certainly have failed, and consequently the plaintiff could be in no better position than Du Preez. Fraud had not been pleaded, and in absence of fraud he (the Chief Justice) was of opinion that the settlement arrived at in October, 1883, was final, and operated as a mutual release. With regard to the amount charged in connection with the syndicate there was not sufficient evidence that Du Preez had any authority to incur expense on that account. Under these circumstances, judgment must be for the defendant with costs.

SUPREME COURT.

TUESDAY, MARCH 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS), and Mr. Justice SMITH.]

GREEN AND CO. V. BEVERIDGE.

Surety — Bond — Partnership — Where a person has become surety for another under a bond and renounced the "beneficia" nothing that such other person may have done can affect the rights of the bondholder against the surety.

Mr. Searle (with whom was Mr. Webber) for the plaintiffs.

Mr. Schreiner (with whom was Mr. Castens) for the defendant.

This was an action instituted by E. K. Green & Co. wine merchants, of Cape Town and elsewhere, against Mr. Beveridge, of Kimberley, to recover the sum of £200, under the following circumstances: On the 12th January, 1889, at Cape Town, the defendant signed a written undertaking, whereby he bound himself as surety for the payment of a sum not exceeding £200, due from William Aiton Briggs, for goods supplied by the plaintiffs. In January, 1889, on the faith of this agreement, plaintiffs supplied liquors exceeding £200, in value, and Briggs became liable. In December, 1890, plaintiffs sued defendant on provisional sentence, which was refused, plaintiffs to go into the principal case, costs to be costs in the cause. The plea was that the defendant was sued for a portion of the price of wine and liquors supplied to W. A. Briggs & Co., and not to W. A. Briggs only; that the defendant did not guarantee the debts of the firm, but only the debts of W. A. Briggs, and therefore that he was not liable for the amount claimed; and generally, the defendant pleaded that he only intended to guarantee the individual debt of W. A. Briggs.

The Chief Justice: Is Briggs a member of the firm?

Mr. Searle: Yes, but we say that Green knew no one else but Briggs in the matter. Long afterwards he did know that another gentleman had some interest in the business, after the goods specified had been supplied.

Mr. Edward Knowles Green, the plaintiff, stated that Briggs was formerly manager of his Kimberley branch, and in 1888 proposed to start business at Johannesburg, giving Beveridge as security for £200. It was understood, for business purposes, that he would trade as Briggs & Company, but it was a fact that there was only Briggs in the business.

The Chief Justice: If the goods were supplied to Briggs, the liability would remain. He might call himself by any name.

Mr. Searle: An attempt will be made to show that Briggs had a partner, whom he took in at some other time.

Plaintiff, continuing, said that in May, 1889, Briggs had a fire at Johannesburg. He never told witness that he had a partner until later in the year. In April, 1889, Briggs became insolvent, and witness proved for £1,065 18s 8d.

Cross-examined: He admitted that in the correspondence he addressed Briggs as Briggs & Co. Mr. Briggs had greatly misled him, and he never knew that Geddes was anything but a clerk in Briggs's employ until the latter put him forward as a partner.

Re-examined: He would not have supplied the goods to the firm of Briggs & Geddes, although he would and did to Briggs alone. His objection to Geddes was on personal grounds.

Mr. Edward Knowles Green, jun, produced the accounts of the firm, and showed the amount due by W. A. Briggs.

This closed the plaintiff's case.

Mr. Castens read the evidence of Briggs, taken on commission in Natal. He stated that Geddes was his partner, and E. K. Green, sen., was well acquainted with it.

For the defence

Mr. George Beveridge, general importer, of Kimberley, stated that he signed the agreement on the 12th January, 1889. He did not then know that Briggs was going to trade in partnership, but he ascertained so afterwards. Witness had no financial interest in the business. Mr. Green never told him that Briggs would carry on business as Briggs & Co.

Cross-examined: He gave the security of his name to Briggs alone. Briggs never said anything about Geddes at first. When he heard Geddes was in partnership he concluded that his suretyship would be at an end, although he never informed the plaintiff of his belief.

By the Court: He would not have taken Geddes's liability.

This closed the defendant's case.

Without calling upon Mr. Searle for the plaintiff, the Court gave judgment.

The Chief Justice said the question whether defendant was bound beyond the scope of his engagement depended upon a further question of fact whether the plaintiffs did or did not give credit to Briggs alone. In his opinion all the evidence tended to show that throughout the plaintiffs depended upon the credit of Briggs only, and that he did not know Geddes was to be a partner. He was also satisfied that Beveridge did not know that Geddes was to be a partner, and that if he had, he would not have become surety.

What Briggs might do behind the back of the plaintiffs, could not affect their rights under the bond, and plaintiffs were entitled to judgment with costs.

DUNA V. SABENKOLA.

Non-jurisdiction and irregularity—Act 20 of 1856—190th rule of Court—"Judicial proceedings capable of being reviewed"—Where a Resident Magistrate not in his magisterial capacity but as "Head of the District" had settled a dispute between two natives, such a proceeding was held not to be a judicial proceeding capable of being reviewed within the 190th Rule of Court.

Mr. Schreiner appeared for the applicant.

Mr. Giddy for the respondent Jenner, and Mr. Juta for the respondent Sabenkola.

This was an application to show cause why an action adjudicated upon by the Resident Magistrate of Glen Grey (Mr. Jenner) should not be brought under review of the Supreme Court on the grounds of irregularity and non-jurisdiction. It appeared that Sabenkola laid a complaint regarding a certain dam and watercourse alleged to belong to him. The parties appeared before the Magistrate, not in his capacity as Magistrate, but as head of the district, and after hearing them the Magistrate gave judgment for Sabenkola, ousting him, as Duna alleged, out of possession of the land. The matter was brought before the Supreme Court on the grounds that the proceedings were irregular, in that no summons was issued or served on the applicant, and that the evidence was not taken of either; that the Magistrate refused to admit material evidence, and that he had no jurisdiction to determine the case under the Act 20 of 1856.

The Chief Justice gave judgment. He said that in his opinion this was no case for review at all. The 190th Rule of Court clearly referred to proceedings in an inferior Court of Justice, but the present proceedings did not take place in any Court at all. The Magistrate seemed to believe himself head of the district, and when he had performed his judical functions in the Periodical Court, he then, in a private manner, called the parties together, and settled the dispute. Either it was in the nature of an arbitration, or it was wholly null and void. It was not alleged on behalf of the applicant that it was in the nature of an arbitration, and that being so, the proceedings were wholly null and void, and the applicant was not aggrieved by the Magistrate's order. He was no more bound to obey this so-called order than he would have been bound if any private person had made a similar order. In that respect the case clearly differed from the case in which a magistrate gave a verbal notice to a witness to appear when the witness did not appear, and he was committed for contempt of Court. Clearly this man was aggrieved, there being something to appeal against there; but in the present case the plaintiff was not aggrieved in the least. He chose to obey what he believed to be a judicial order, but that was owing to his ignorance of the law. If he had known his rights, he would have known that he was not bound to obey the Magistrate's order. Clearly it was not a case in which the particular rule of Court was applicable. Probably the applicant, even though he had given up occupation of the land, might have his rights against the Government or other parties, by action, to be reinstated in the land which he gave up under the belief that he was bound to give it up. In his (the Chief Justice's) opinion, the proceeding was not a judical proceeding capable of being reviewed and the application must be refused with costs.

VAN HEERDEN V. THE MUNICIPALITY OF VICTORIA WEST.

Municipality—Municipal Regulations—Cesspools—Where a Municipality has by its regulations power to close cesspools it cannot compel an inhabitant to empty and close a cesspool situated on his land.

Mr. Juta appeared for the appellant.

Mr. Giddy for the respondents, the Municipality of Victoria West.

This was an appeal from the Resident Magistrate of Victoria West. The appellant was charged by the Municipality with contravening section 41 of the Town Regulations in that on the 22nd December, 1890, he failed to close a cesspool (situated on his property, Erf 47), the same being considered prejudicial to public health. Evidence was taken and the appellant (then defendant) was fined 5s., or ordered to be imprisoned for a day.

The Chief Justice remarked, as Mr. Juta was proceeding to argue, that the prisoner had pleaded guilty.

Mr. Juta: That must be a mistake, my Lord, (Laughter.)

Mr. Giddy: No, it is not.

Mr. Juta: The whole of the evidence was gone into. There must be some mistake.

Mr. Giddy: No. The prisoner on being arraigned pleaded guilty.

Mr. Juta: Well, I can't help what the Magistrate sends up.

The Chief Justice: You mean you can't help what your client chooses to send. (Laughter.)

Mr. Juta: But the curious thing is that the evidence for the defence is called.

The Chief Justice: Is that a mistake, Mr. Giddy?

Mr. Giddy: No, my Lord; it was arranged that he should plead guilty to not having closed his cesspool on the command of the Council, and it was by consent arranged that the evidence should be evidence against certain other defendants, and the whole point that now arises is whether this regulation (41) is *ultra vires* or *intra vires*. Proceeding, Mr. Giddy quoted a case in which a man charged with a Municipal offence pleaded guilty, but was found not guilty on the ground that the regulation was *ultra vires*.

The Chief Justice, after referring to the case, said Mr. Giddy was unfortunate in having mentioned it as it was a strong point in favour of Mr. Juta.

Mr. Giddy: I am sorry Mr. Juta did not quote it then. (Laughter.)

The Chief Justice, in giving judgment, said he regretted to have to come to the conclusion that the Town Council and the Magistrate had somewhat erred. If this 41st regulation was within the powers of the Council, then the Council ought to have closed the cesspool themselves. They ought to have carried out their resolution to empty the cesspool and then close it up, which power they had. But instead of that they called on the owner to empty and close it, but there was no regulation authorising them to call on the owner to go to that expense. In the present case the defendant was charged with neglecting to close the cesspool when there was really no regulation compelling him to do so. The 41st regulation certainly did not; it only authorised the Town Council to do so, and this objection was not taken in the Court below. If costs had been asked for he should certainly not have given them, because the only objection taken in the lower Court was that the regulation was *ultra vires*. The appellant had done nothing in contravention of the 41st regulation, and the sentence must be quashed.

REGINA V. LOONTJES.

Masters and Servants Act—Police Act—Using abusive and obscene language—Conviction quashed.

Mr. Justice Smith stated that this case had come before him from a special justice of the peace at Durbanville. The prisoner was charged with having used abusive and obscene language on a farm with intent to provoke a breach of the peace. He sent the case back to the Magistrate to know under what Act he had proceeded, and pointed out to him that the Police Act only applied to the use of abusive language in a public place. The Magistrate returned the record, saying that prisoner was charged under the Masters and Servants Act. The only witness in reference to the alleged offence stated that the accused was not a servant at all, therefore the conviction must be quashed. Regarding a person coming into another's house, there was no remedy whatever, except the intruder were told to leave the house, and then, if he refused, he could be indicted under the Police Act for trespass. But there was no Act that he was aware of that provided for a person coming into a house and using bad language.

SUPREME COURT

(IN CHAMBERS).

TUESDAY, MARCH 10.

[Before Mr. Justice SMITH.]

IN THE INSOLVENT ESTATE OF HENRY HEATH.

Insolvency—Transfer of shares by insolvent.

Mr. Schreiner, on behalf of the trustee, applied for the appointment of a commission at Kimberley, to examine Mr. Henry Lang and Mr. W. H. Craven regarding the transfer, by the insolvent, of 100 shares in the De Beer's Consolidated Mines. It appears that the insolvent, whose present address is unknown, is the registered shareholder of 112 shares in the Cape of Good Hope Bank, and that shortly after his insolvency he disposed of the 100 shares which he held in the De Beer's Mines. The object of the commission applied for was to examine witnesses as to this latter transaction.

The Court granted the order, and appointed the Resident Magistrate of Kimberley commissioner; a further application to be made should the examination of other witnesses be considered necessary.

THE PAARL BANK (IN LIQUIDATION) V. HUGO AND OTHERS.

On the application of Mr. Graham, authority was granted to the liquidators of the above bank to issue execution against certain contributories in respect of shares held by them in the said bank, upon each of which a call of £250 has been made.

IN RE LUSCOMBE'S TRUST FUND.

Trustees—Appointment of trustees by Chancery Division of High Court of Justice (England) confirmed.

Mr. Graham moved for an order confirming or recognising the appointment by the Chancery Division of the High Court of Justice of trustees of the said fund, and authorising the payment thereof by the present holders. The petitioners were Mr. Charles Judge, broker, of Trinity House-lane, Kingston-upon-Hull, Yorkshire, and Mr. William Luscombe, of Oldbro' Villa, Marlborough-avenue, in the same borough, trustees of a sum of money made over by Henry Luscombe, who died in Cape Town in 1854, to the late Hon William Porter. The latter died in 1880, without having appointed a trustee, and the fund has since been administered by the Colonial Orphan Chamber.

The Court confirmed the appointment made by the Chancery Division of the High Court of Justice.

SUPREME COURT.

THURSDAY, MARCH 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS), and Mr. Justice SMITH].

UNION BANK (IN LIQUIDATION), V. WATSON'S HEIRS.

Company — Bank in liquidation — Contributories—Executors—Payment *de bonis propriis*.

The Chief Justice mentioned that Mr. Schreiner appeared in this case the other day, and the Court was of opinion that the principle which guided them to a decision in Hofmeyr's case should also apply to Watson's. Were the shares kept unsold by the executors with the consent of the heirs?

Mr. Schreiner said he had no information upon the point.

The Chief Justice: As, against creditors whom the liquidators represent, were the executors of Watson's estate justified in paying anything to the heirs?

Mr. Schreiner: We say no.

The Chief Justice then intimated that the Court was of opinion that a rule *nisi*, similar in its terms to that in Hofmeyr's matter, should be granted, returnable on the 18th of next month. The order in detail was, calling on the executors to show cause why they should not, failing sufficient further assets in the estate, be ordered to pay *de bonis propriis* the amount of the calls due in respect of the shares standing in the name of Mr. Watson, not exceeding, however, such sums as the executors had paid out to the heirs and legatees. The executors would be justified in making payments to creditors.

THE UNION BANK V. THOMPSON.

On the motion of Mr. Schreiner, provisional sentence was granted on a promissory note for £201.

HYLAND V. BROWN.

On the application of Mr. Jones, the provisional order for sequestration was discharged.

STANDARD BANK V. POPPE, RUSSOUW AND CO.

On the motion of Mr. Graham, the final order for sequestration of defendants' estate was granted.

WICHT V. JAMES RUTHERFOORD.

Mr. Sheil moved for provisional sentence for £14 12s. 6d., interest on mortgage bond, and 14s., premium paid on policy of fire insurance in terms of bond.—Provisional sentence granted.

VAN ZYL V. SCHWARTZ.

On the motion of Mr. Juta, provisional sentence was granted on an acknowledgment of debt for £86 2s.

GERICKE V. LAMPRECHT.

On the application of Mr. Juta, a final order for the sequestration of respondent's estate was granted.

DARTER V. GREATBACK.

On the motion of Mr. Jones, provisional sentence was granted on a dishonoured cheque for £21 18s. 6d., subject to the production of a certificate of presentation

BOTMA V. BOTMA.

Sale—Conditions—Payment by instalments—Provisional sentence refused where period within which first instalment was to have been made had not expired.

Mr. Juta, for the applicant, moved for provisional sentence on two conditions of sale (one of which was in English and the other in Dutch) for £1,000 and £950 respectively. It appears that the conditions were signed on the 20th December, 1890,

and that the money was to be payable in three instalments, the first payment to be within three months after the signing of the conditions; there were further conditions that the respondent should either find sureties or pass a bond as security for payment of the instalments.

Mr. Schreiner, who opposed the motion, contended that no money was yet due, as the first three months (within which period the first instalment was to be paid) had not yet elapsed.

Provisional sentence refused with costs.

CAPE CENTRAL RAILWAYS V. JOHN WALKER.

Costs taxed of motion in High Court of Justice—Provisional sentence—Where a person brings two actions and is unsuccessful in the first he must pay the costs of the unsuccessful action before he will be allowed to proceed with the second.

Mr. Schreiner moved for provisional sentence on a sum of £271 7s 4d., taxed costs of a motion made by defendant in the High Court of Justice, against the official liquidator of the company in England (Mr. John Drew Behr), in which the latter was respondent.

Mr. Juta, for the defendant, said he had no defence, but he asked for a stay of execution, pending an action about to be brought by Mr. Walker against the official liquidator of the company in South Africa, for a sum of nearly £100,000. Security would be given.

The Chief Justice, in giving judgment, said it would be quite against the practice of the Court if stay of execution were ordered. The principle generally adopted was that where a person brought two actions, and he was unsuccessful in the first, he must first pay the costs before he was allowed to proceed. The Court could not assume that Mr. Walker would be successful in the action pending, and in the meanwhile he must pay the costs of the previous case. Provisional sentence would be granted with costs.

HAMILTON ROSS AND CO. V. ISAAC SAUNDERS.

On the application of Mr. Jones, provisional sentence was granted for £60 2s., being balance of account.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Marthinus Wilhelmus Theunissen, Albertus Johannes du Toit, José Antonie Cabrita, and Julius Vogl.

CROZIER V. CROZIER.

On the motion of Mr. Graham, the rule *nisi* was made absolute dissolving the marriage subsisting between the parties.

PETITION OF SOPHIA MCLEROTH.

Sir Thomas Upington, Q.C., applied for the appointment of a *curator ad litem* in proceedings about to be instituted by petitioner to have her husband declared of unsound mind and incapable of managing his own affairs.

The Court granted the application, and appointed Mr. Sheil *curator ad litem*.

ESTATE LATE JOHN JAMIESON.

Will—Executors exempted from filing accounts—Ordinance 104—Notice—Where a testator has exempted his executors from filing the ordinary administration accounts—Notice ought to be given to the executors before calling upon them to conform to the provisions of Ordinance 104.

Mr. Schreiner moved for an order requiring the executors of the above estate to render to the Master of the Supreme Court a complete inventory and account of administration in terms of the Ordinance No. 104.

The Chief Justice said that where a testator had exempted his executors from filing an account notice ought to be given to the executors by the Master before any application could be made to the Court. There would be no order, but notice must be given to the executors.

THE CAPE OF GOOD HOPE BANK, (IN LIQUIDATION), V. EAST, RUNCIMAN AND OTHERS.

Company—Bank in liquidation—Compromise—Former shareholders—Contributories—Excussion—Act 23 of 1861.

Where liquidators have entered into a compromise with a shareholder, and have not availed themselves of the powers conferred upon them by Act 23 of 1861, Section 13, they cannot fall back upon former shareholders who had *bona fide* transferred their shares to the person with whom the liquidators have compromised.

Quære—Whether past shareholders can be placed upon the list of contributories before all the assets of the bank have been realized.

Sir Thomas Upington, Q.C, moved for leave to issue execution against Messrs East, Runciman, Stewart, and Stamper for the deficiency arising out of a compromise entered into by the official liquidators and one Frederick W. Mills in respect of sixty-seven shares in the said bank, of which the respondents were former holders, or, in the alternative, to place the names of the respondents upon the list of contributories. The affidavits of Mr Harry Bolus, one of the liquidators, showed that, even if all present shareholders paid up their liability of £80 in full, there would still be a deficiency. Frederick William Mills owned seventy shares in the late bank, the calls on which were £2,100. A compromise had been entered into, under which he had paid £1,319 10s. 8d., leaving a deficiency of £780 9s. 4d. Of these shares sixty-seven were acquired by Mills from the above-named respondents within two years of the order of the winding up of the bank, and at a time when there were certain debts existing, for the payment of which their liability, it was urged, had not ceased. This period was within two years. Mills having received twelve shares from East in 1888, eight from Stewart in February, 1890, forty-four from Stamper in March, 1890, and the remaining three from a Mr. Brasch, who some time since went to Australia, and against whom no order was sought.

Mr. Schreiner read the affidavits of the respondents, who generally denied the *locus standi* of the applicants, and denied their liability, and that the shareholders had to be fully excussed.

In the course of argument, Sir Thomas Upington said he could find nothing to support the view that, where the Court had approved of a compromise, it was anything more than an excussion for the time being, and a compromise did not amount to a complete exoneration of any other person who would be liable.

The Chief Justice observed that the liquidators now only represented creditors, and could these creditors have sued past shareholders after having made compromises with present shareholders?

Sir Thomas Upington submitted they could.

The Chief Justice asked Mr. Schreiner if he contended that there must be a realisation of all assets before past shareholders could be touched?

Mr. Schreiner replied that there must be either an actual realisation, or such a realisation of their actual value as the Court would take as conclusive.

The Chief Justice said the Court had already decided in the Paarl Bank matter that the liquidators represented the creditors, and as soon as the winding-up took place no creditor had any claim against past or present shareholders.

Sir Thomas Upington, in addressing the Court, pointed out that the question was one of considerable importance, because, as he was informed, there were about seventy of these compromises pending, and if it were decided that they released the prior shareholders, it would cause a condition of things that might be disastrous to many.

The Chief Justice, in giving judgment, remarked that, in winding-up proceedings, the liquidators represented the company and the creditors. So far as they represented the company, they had no claim against past shareholders. Under the terms of the 20th clause of the trust deed, as between the shareholders themselves, the present shareholders had no claim whatever against past shareholders to compel them to contribute towards the debts of the company, and the only principle upon which the liquidators could have any claim against past shareholders in the present case was on the principle that they represented for certain purposes the creditors of the company. Now the liquidators, as representing the creditors, could have no greater rights than the creditors themselves would have had at the time when the order for the winding-up was made. If a creditor whose debt existed before any shareholder transferred his shares had sued such a shareholder, he would have been bound to show that there had been a complete excussion against the present shareholder before the past shareholder could be held liable. In the present case it appeared that Mills had proposed a compromise, which had no doubt been assented to by the Court, but it was assented to on the assumption that the liquidators had ascertained that it would be wholly impossible to obtain more from him than had been obtained by means of the compromise. But that was an assumption that was not binding on past shareholders who had transferred their shares; they were still liable to any benefits which the 13th section of Act 23 of 1861 had given to them. Regarding the 12th section, he (the Chief Justice) desired to say there had already been sufficient excussion of the company itself to justify the liquidators to come on the present shareholders, otherwise the order of Court could not have been made placing present shareholders on the list of contributories. The mere fact that the bank had been put under the Winding-up Act amounted, he thought, to an excussion for the purposes of making present shareholders liable. His lordship then read the terms of the 13th section, and said that no words could be stronger; actual execution was required. He could very well imagine there might be instances where actual execution might not be required, for the reason that what amounted to execution had already been issued. If, for instance, Mills had become insolvent, proof in his insolvent estate would have been sufficient, for the simple reason that the law did not authorise further execution against a person's estate which had been placed

under sequestration, except under circumstances which he need not now mention, and which would not apply here. But Mills was not insolvent; the liquidators had made a compromise with him, and altogether he (the Chief Justice) thought that former shareholders were now entitled to say "You cannot fall back on us, because you have not made use of the privileges given you under the 13th section." For this simple reason, he was of opinion that the present application to place the respondents on the list of contributories ought to fail. At the same time he thought they ought to go further, and in his opinion certainly, even if there had been no compromise with Mills, he would have held that the application was at present premature. The Court had not sufficient information to settle the rights and liabilities of contributories, and until they had such information it was impossible for them to place any past shareholders on the list at all. The Court ought to be satisfied, before placing any past shareholders on the list, that it was wholly impossible to obtain from the present shareholders sufficient to pay the debts and liabilities of the company. The Court knew from information before them that the bank held a large quantity of gold scrip for realisation, and until that had been realised it was impossible to say that the present shareholders would be unable to satisfy all the liabilities, because by the realisation of the scrip the liabilities might be reduced to such an extent that the present shareholders would be able to pay the whole of the liabilities. In holding this view he (the Chief Justice) must add that he could not agree with Mr. Schreiner that the two years would continue to run in favour of past shareholders. He was inclined to think that as soon as the company was placed under the operation of the Winding-up Act that the two years would cease to run, and the rights of shareholders, past and present, must be looked at as existing at the time that the winding-up order was made. He mentioned this so that it might not be supposed that, owing to any length of time in realisation of the assets, the past shareholders would on that account be relieved from liability. The judgment of the Court must be for the respondents with costs, the application being refused.

THE COLONIAL ORPHAN CHAMBER V. MARNITZ.

Mr. Schreiner, for the applicants, moved to make absolute the rule *nisi* restraining the respondent from entering on certain land, the property of applicants, known as Riet Valley, situated in the division of Uniondale.

Sir T. Upington, Q.C., for the respondent, opposed the motion.

After hearing the arguments of counsel the Court suspended the operation of the rule, the applicants to bring their action at as early a date as possible.

VAN ZYL AND OTHERS V. DE BEER'S EXECUTRIX.

This matter was ordered to stand over till Tuesday next.

THE DUTCH REFORMED CHURCH, ADDERLEY-STREET, V. THE REGISTRAR OF DEEDS AND OTHERS.

Mr. Schreiner, who appeared for the Consistory of the Dutch Reformed Church, Adderley-street, applied for an order requiring the cancellation in the Debt Register of a certain bond for £800 registered as owing to the Board of Executors, of Cape Town, by the Bree-street Dutch Reformed Church, on the ground that no such debt was owing by the said Church.

Sir T. Upington, Q.C., on behalf of the respondents, submitted that the only question before the Court was that of the costs of the application, as the bond had been paid off and the applicants had sustained no injury by the misdescription which had appeared in the Debt Register.

The Registrar of Deeds having explained the circumstances under which the entry had been made, the Chief Justice said that the Court was clearly of opinion that the applicants had not been prejudiced in any way. Under these circumstances, the application must be refused with costs.

MEYER V. REISBERG.

On the application of Sir T. Upington, Q.C., the rule *nisi* was made absolute interdicting the respondent from removing reeds and grazing cattle on the farm Kasselsvlei, in the district of the Cape, pending an action to be brought for ejectment, damages, and perpetual interdict.

Mr. McLachlan consented, and the rule was made absolute with costs.

SUPREME COURT.

FRIDAY, MARCH 13.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice SMITH.]

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. EAST, RUNCIMAN, AND OTHERS.

The Chief Justice said that with regard to the above matter, which had been heard yesterday, he

wished to be clearly understood that the judgment in that case proceeded solely upon the ground that, by the compromise with Mills, the liquidaters were debarred from placing the respondents upon the list of contributories, and that what else had been said in that case should be regarded as *obiter dictum*. He still thought that the application was premature upon the information which had been put before the Court, but the question whether past shareholders could not be put upon the list of contributories before all the assets had been realised had not been decided and was still open for argument, and the Court thought it would be well if another case were brought before it in such a shape that this latter point, as well as the question of the two years, could be fully discussed and decided.

THE UNION BANK, (IN LIQUIDATION.)

On the motion of Mr. Schreiner, leave was granted to issue execution against Philip H. Brentnall in respect of calls due upon certain twenty shares in the said bank.

LEVATTE V. LEVATTE AND HENDERSON.

Divorce—Unstamped affidavits allowed to be read.

Application to make absolute rule *nisi* permitting applicant to sue *in forma pauperis* refused, and rule discharged where it appeared from affidavit that applicant had realized joint estate and remained in possession of proceeds.

Mr. McLachlan moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action to be brought by him for divorce and for damages.

Mr. Sheil, for the first-named respondent, applied for discharge of the rule, and with permission of the Court, read two affidavits (which had been refused by the Registrar as not being stamped), which set forth that the applicant had been in constant employment at the Salt River works for the past eleven years; that he had realised the joint estate of himself and his wife, and was in possession of the proceeds, and generally that he was in a position to proceed with his action in the ordinary course.

The Court discharged the rule, but made no order as to costs.

PETITION OF HARRIET PARKER.

Mr. Schreiner moved for the appointment of the Griqualand West Board of Executors as *curator bonis* in the estate of Mary Ann Hopkins, a person of unsound mind. Mrs. Hopkins was recently declared a lunatic, and the applicant was appointed curator, but being unable to procure the necessary security the present application was made.

The Court appointed Mr. Francis Joseph Gardner, secretary of the Griqualand West Board of Executors, Kimberley, as *curator bonis*, costs to come out of the estate.

THE PETITION OF MARY ANN LOYDEN.

Mr. Shiel, on behalf of the petitioner, moved for leave to sue *in forma pauperis* in an action to be instituted by her against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel for his certificate.

IN THE ESTATE OF THE LATE JOHN SPIRO MASTERS.

Will—Landed Property—Executor dative, Debts due by estate.

Where under a will the sale of landed property had been prohibited the Court refused to empower an executor to sell the property to meet existing claims until satisfied that sufficient money for that purpose could not be raised by way of mortgage.

Mr. Schreiner moved for authority to Mr. W. A. Currey, the executor dative, to sell the landed property in the estate for the purpose of satisfying debts and maternal inheritance.

It appears that Mr. Masters died last year. By the terms of his will, the landed property in the estate, which consists of three lots of ground with buildings thereon, situated in Port Elizabeth, and yielding a rental of about £48 a year, was ordered not to be sold. There was a debt of £50 due by the estate to Messrs. Ohlsson & Co., one of the children had also reached his majority, and was entitled to his maternal inheritance. There were no funds in hand to meet these claims, and in consequence the executor dative asked that permission should be given him to sell the property.

The Chief Justice said he thought no order ought to be made on the present application until some attempt had been made to raise money on mortgage. To sell the property would be in opposition to the will, and he was not satisfied that money could not be raised.

THE PETITION OF MICHAEL CUNNINGHAM.

Transfer—Bond on property—Refund of purchase money—Refusal to cancel.

Mr. Schreiner moved for authority to the Registrar of Deeds to cancel the transfer to James

Maloney of certain lot of ground situated in Pier-street, Port Elizabeth, the sale to the said Maloney having been cancelled, and the purchase price refunded.

It appears that the petitioner, who is a police-constable in Port Elizabeth, sold the ground to Maloney for £25. After transfer had been passed it was discovered that there was a bond on the property. In consequence of this the purchase price was refunded to Maloney, but the transfer had not been cancelled. Maloney was now reported to be in North America, and the Registrar of Deeds refused to cancel the transfer unless Maloney were a party to the cancellation.

The Court granted a rule calling on James Maloney to show cause on the first day of next term why transfer should not be cancelled; the rule to be published in the *Government Gazette*, and served on the Registrar of Deeds.

PAARL MUNICIPALITY V. BLIGNAUT.

Nuisance—Municipality—Distillery refuse—Open drain—Interdict suspended.

Sir Thomas Upington, Q.C., for applicants.

Mr. Schreiner for the defendant.

This was a motion to make absolute a rule *nisi* restraining the respondent, Jan Hendrik Blignaut, from discharging any refuse from the distillery of Blignaut & Co., of the Paarl, into the Municipal drain, pending an action to be brought to compel the defendant to abate the nuisance. The affidavit was read of the chairman of the Paarl Municipality, who stated that the distillery was in the most densely populated part of the town, and that the refuse flowed for a distance of over 1,000 yards in the Municipal drain on the side of Market-street, before discharging itself into the Berg River. Complaints had frequently been lodged with the Municipality, and the respondent had been called upon to abate the nuisance. The firm had occasionally flushed the drain with water, but had done nothing permanently to abate a nuisance which was now intolerable. A petition against the nuisance had been presented by a number of the inhabitants.

The affidavit of Jan Hendrik Blignaut, the respondent, was also read. He stated that the business had been carried on for thirty-six years, and that most of the distilling was done in the winter months. The refuse was carried by a brick gutter a distance of 150 yards, when it fell into an open Municipal drain crossing the main road. It consisted mainly of distilled wine and clean water used for cleaning the machinery; the fluid was clean and inoffensive when it left the distillery, and continued so until it came into contact with the rubbish and garbage put in the Municipal drains by the inhabitants, which was allowed to remain until it was decomposed and an offensive smell arose, and this it was the duty of the Municipality to prevent. Deponent had heard of no complaints regarding the private drain of 150 yards in length, and he had offered to the applicants to lay pipes on the £ for £ principle, but they had refused to accept the proposal.

Mr. Schreiner also read the affidavits of Mr. Malherbe, who previously owned the distillery, and of the District Surgeon and another doctor, who practises at the Paarl, and which showed that the nuisance was caused by the Municipality not keeping the drain clean.

The Chief Justice remarked that the liquid might be quite innocuous when it left the distillery, but when it had gone some distance it might become a great nuisance, as in the case of refuse from a brewery.

Mr. Schreiner quite agreed, but said a brewery was quite different from a distillery.

The Chief Justice suggested that the case was not one for a rule *nisi*. People's ideas upon sanitation were certainly more refined in the present day, but it must be remembered that the distillery had been discharging refuse for a very long time, although the fact that the inhabitants had not offered opposition previously did not prove that the refuse was inoffensive.

After argument,

The Court gave no expression of opinion upon the case, but suspended the interdict pending an action for a perpetual interdict, the applicants undertaking to keep the drain clean of other offensive matter; costs to be costs in the cause.

The Chief Justice said it would be all the better if the parties could come to an amicable agreement.

INSOLVENT ESTATE DONALD D. HOUSTON.

Mr. Schreiner moved to make absolute the rule *nisi* authorising the Registrar of Deeds to register in the name of the said estate a certain farm called Vlakplats, situated in the district of Griqualand East.

The Court made the rule absolute, subject to the production of a Kokstad paper containing notice.

D'ARC V. BENSON AND MCDERMOTT.

Sir Thomas Upington moved to make absolute a rule *nisi* interdicting the sale in execution in the said suit of certain property attached by the Deputy Sheriff of Uitenhage, pending the decision of the Court as to the ownership thereof. There was no appearance for the defendants, and

The Court made the rule absolute as prayed, costs to abide the result.

DAMARALAND MINING AND EXPLORATION COMPANY, LIMITED.

Company—Winding up—Appointment of liquidators.

Mr. Schreiner moved to have this company placed under the operation of the Winding-up Act, and for the appointment of Messrs. H. Gibson and J. A. Bam as official liquidators. The liabilities being £650, and the assets £150.

The motion was granted, the official liquidators to have powers under the 15th section of the Act.

PETERS V. PETERS.

Mr. Jones moved, on behalf of Mrs. Peters, at present residing in the district of St. Mark's, Tembuland, for an order of restitution of conjugal rights against her husband, William Peters, and failing compliance with which a decree of divorce, and the custody of the two children of the marriage. The parties were married in 1880 at King William's Town. In 1884, whilst they were at Cradock, defendant deserted his wife, who had never seen him since. Neither was she acquainted with his whereabouts until comparatively recently, when she learned that he was in Auckland, New Zealand, and in a letter had expressed himself as unfit to return to the Cape, and he had no intention of so returning. He hoped his wife would get a divorce if she applied for it.

The Court granted the order as prayed, defendant to return to or receive plaintiff on or before 30th May next, failing which to show cause on the last day of next term why a decree of divorce, carrying with it the custody of the children, should not be granted the plaintiff, the order to be published in the same manner as the interdict, namely, in the *Auckland Star*.

SUPREME COURT.

TUESDAY, MARCH 17.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice SMITH.]

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. THE SOUTH AFRICAN ASSOCIATION, IN THEIR CAPACITY AS EXECUTORS OF THE LATE MR. VAN LEER.

Company—Bank in liquidation—Call on shares—Execution—Payment by executors *de bonis propriis*—Rights of executors against heirs and legatees.

Mr. Schreiner, on behalf of the applicants, moved for leave to issue execution for £360, being the amount due on calls in respect of twelve shares registered in the name of the late Mr. Van Leer.

Mr. Juta appeared for the respondents.

After hearing the affidavits and arguments of counsel, the Court granted a writ of execution against the respondents, and failing assets, granted a rule calling on them to show cause on 13th April why they should not pay the amount of the calls *de bonis propriis*, reserving to the respondents any rights they may have against the heirs or legatees of the estate.

MCLEROTH V. MCLEROTH.

Sir T. Upington, Q.C., appeared for the applicant, and Mr. Shiel, as *curator ad litem*, for the respondent.

This was an application to make absolute a rule *nisi* calling upon the respondent to show cause why he should not be declared of unsound mind and incapable of managing his own affairs.

The Court having heard the evidence of Dr. Dodds, medical superintendent of the Valkenberg Asylum, Mowbray, declared the respondent of unsound mind, and incapable of looking after his own affairs, and appointed his wife, Mrs. Sophia McLeroth, of Beyer's Hotel, Caledon, curator of his property and guardian of his minor children.

VAN ZYL AND OTHERS V. DE BEER'S EXECUTRIX.

Interdict—An interdict will not be granted unless a *prima-facie* case has been made.

Mr. Searle moved for an order restraining the respondent from obstructing the flow of the water in a furrow leading from the farm Matroosfontein to Wittedrift, in the district of Piquetberg.

Mr. Schreiner appeared for the respondent.

The Chief Justice, after having heard the arguments of counsel, remarked that the case was clearly not one for an interdict, as a *prima-facie* case had not been made. No order would be made at present, it being open to the applicants to bring an action for damages, if they had incurred any, costs to be costs in the cause.

C. CLACK AND OTHERS V. THE RESIDENT MAGISTRATE OF GRAAFF-REINET.

Municipality—Municipal regulations—Regulating "traffic and processions"—Salvation Army—Ordinance 9 of 1836, and Act 45 of 1882.

Mr. Juta appeared for the appellants, and Mr. Schreiner for the respondent.

This was an appeal from a decision of the Resident Magistrate of Graaff-Reinet, in a case in which certain members of the Salvation Army were summoned by the Graaff-Reinet Municipality for having contravened one of the Municipal regulations by marching in procession through the streets, blowing trumpets and beating a drum, to the annoyance of the inhabitants, without having obtained the consent of the Municipality. The appellants were convicted, hence the appeal.

Mr. Juta having addressed the Court in support of the appeal,

The Chief Justice, without calling upon Mr. Schreiner to reply, said the appellants were somewhat misled by the decisions of the Court in the Paarl and Wellington cases, which were decided under Ordinance 9 of 1836, and which did not give Municipalities the larger powers conferred on them by Act 45 of 1882. Under the 109th section, subsection 4 of that Act, the Municipalities had power to make bye-laws for suppressing nuisances, and quite independently of nuisances, the 26th subsection gave them the power of making bye-laws for regulating traffic and processions. The Graaff-Reinet Municipality relied upon their 103rd regulation, which provided that no person should sing, yell, or create other objectionable noise in the streets without the consent of the Municipality. He (the Chief Justice) was not prepared to say that the whole of this regulation was within the power of the Municipality—for instance, as to single person singing or beating a drum in the street—but where there was a procession of persons parading the streets and beating drums and playing instruments, it was clear there was an infringement of the 103rd section, to the extent to which the Municipality was justified in making the regulation. In his opinion, to that extent the regulation was entirely *intra vires*, and the Municipality had the power to provide that there should be no procession with playing of musical instruments, without the consent of the Council having first been obtained. The Magistrate was right in his judgment, and the appeal would be dismissed with costs.

Mr. Justice Smith, whilst not prepared to differ from the judgment of the Court, particularly as Mr. Justice Buchanan had given a similar decision, yet had some doubts as to whether a bye-law of the kind in question came within the meaning of the words "regulating traffic and processions." He could quite understand that if a procession made a nuisance, it would be a proper regulation to prohibit it, but it seemed now as if a Roman Catholic burial procession, passing along the streets and chanting, would not have the right to proceed at all without permission. The case involved by the present appeal seemed to him a doubtful one.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, MARCH 24.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice SMITH.]

ADMISSION.

On the motion of Mr. Schreiner, Mr. Charles W. A. Hayward, of the Inner Temple, was admitted to practise as an advocate.

REGINA V. GUYSMAN.

Act 27 of 1882, section 9.

The Chief Justice remarked that the above case had come before him for review from the Special Justice of the Peace at Prince Albert. The accused was charged with contravening Act 27 of 1882, section 9, and was convicted. There was no evidence that the accused was drunk in any street road, lane, or public place, or in or near any shop, store, hotel, or canteen, and consequently the conviction must be quashed.

REGINA V. HENDRIK FILLIS.

Act 18 of 1898, section 2.

This case came on review before Mr. Justice Smith from the Resident Magistrate of Riversdale. The accused was charged under Act 18 of 1888, section 2, and was convicted.

Mr. Justice Smith remarked that there was an absence of motive and of evidence that the offence had been committed by the accused. Under these circumstances the conviction must be quashed.

IN THE ESTATE OF THE LATE WILLIAM WESLEY MARTIN.

Deed of transfer—Amendment of—Where curators had purchased land and passed a bond in their individual names, and not in their capacity as curators, the Court directed the necessary amendment to be made.

Mr. Schreiner moved for authority to the Registrar of Deeds to amend a certain deed of transfer and mortgage bond passed on the 30th November, 1881, by substituting for the individual names of the curators of the said Martin their names in their capacity as curators,

It appeared from affidavit that after Mr. Martin had been placed under curatorship, certain property was purchased for the benefit of the estate for £2,700, of which £1,300 had been paid off, and a bond was passed for the balance in the individual names of the curators, and not in their capacity as curators. The investment proved a profitable one to the estate, as it yields about £282 per annum. Authority was now asked for the amendment of the deed of transfer. To this the mortgagees, the General Estate and Orphan Chamber, consented, and the Court granted the order.

THE PETITION OF HARRY BOLUS.

On the application of Mr. Schreiner, the Court granted six months' leave of absence, from the 1st April next, to Mr. Harry Bolus, one of the official liquidators of the Cape of Good Hope Bank.

PETITION OF FREDERICK J. VAN ZYL.

Mortgage Bond—Cancellation on grounds that mortgagee had been paid.

Mr. Joubert applied for authority to the Registrar of Deeds to cancel a mortgage bond for £150, passed by Gert J. van Zyl to one Balthaser Klopper in 1857, on the ground that the said sum had been paid to the mortgagee.

The Court granted a rule *nisi*, calling upon all persons interested to show cause on the 15th May next why the order should not be granted, notice to be published in the *Government Gazette*, and served on the other heirs in the estate.

PETITION OF PHILIP J. R. HODGES.

Guardians' Fund—Minors—Capital.

Mr. Juta applied for leave to draw from the Guardians' Fund, out of a legacy bequeathed to petitioner by one Mrs. Vos, the sum of £87, to be advanced for one year towards his maintenance and education while studying for the Civil Service Examination. His mother was quite unable to support him.

The Court intimated that application should have been made to the Master in the first instance

Mr. Juta said that was very expensive. A report from the Master would cost £10 or £15.

The Chief Justice: But that cannot be. The Master charges no fees, and there are only the attorney's expenses. I should like to hear from some attorney why the expenses are so high.

Mr. Juta said that the stamp on the Master's report would be a guinea, besides the cost of a second motion and possibly witnesses' expenses. He remembered a case once, and the cost of reference to the Master amounted to £20.

The Chief Justice: We must be careful about referring matters to the Master if the expense is so great.

The Court granted the order.

IN THE MATTER OF THE MINORS RUSSOUW.

Guardians' Fund — Minors — Capital — Interest.

Mr. Webber moved for authority to the tutor testamentary of the minors to draw from the Guardians' Fund, out of moneys devolving upon the minors from the estate of their deceased grandfather, a sum of money to enable them to provide a more suitable education than the present income will allow.

It appeared from affidavit that the present interest only amounted to £79 16s. 8d. per annum, and an additional £100 would be required for the purposes set forth in the petition.

The Court granted an order that so much should be drawn from the capital as, together with interest, would give each minor £60 per annum until he or she had reached majority.

IN THE INSOLVENT ESTATE OF ISIDORE HIRSCH.

On the application of Mr. Schreiner, who represented creditors to the amount of £4,200, Mr. G. W. Steytler was appointed provisional trustee, with power to carry on the insolvent's hotel business at Muizenberg.

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT
(IN CHAMBERS).

TUESDAY, APRIL 7.

[Before Mr. Justice BUCHANAN.]

ADMISSIONS.

On the motion of Mr. Searle, Mr. Robert George Attwell was admitted to practise as an attorney and notary public.

On the application of Mr. Thorne, Mr. David Henry Holme was admitted to practise as an attorney and notary public.

IN THE INSOLVENT ESTATE OF FREDERICK P. J. VAN ZYL.

On the motion of Mr. Molteno, authority was given to the liquidators of the South African Bank to sign their consent to the discharge of the above insolvent in terms of Ordinance 6 of 1843, section 117.

LOUW V. THERON.

Attachment—Judgment—Rule 329—Application for an order directing the Sheriff of the Colony to attach account books and collect outstanding debts refused, there being no precedent for such a procedure.

Mr. Webber applied for an order directing the Sheriff of the Colony to attach the account books of the defendant and to collect the outstanding debts for the purpose of applying the proceeds in reduction of the amount of a judgment of the Supreme Court in a suit between the parties.

It appeared from the statement of counsel that judgment had been obtained under rule 329, and the plaintiff now prayed that the books might be attached and the outstanding debts recovered.

As there appeared to be no precedent for the Sheriff's undertaking the collection of assets in an estate, Mr. Justice Buchanan suggested that the applicant should take proceedings under the Insolvent Ordinance.—No order was made.

M

THE WELLINGTON BANK (IN LIQUIDATION)

Company—Bank in liquidation—Private liquidation—Application for an order fixing the time within which claims should be proved refused on the grounds that as the liquidation was a private one the Court had no power until the parties concerned had put themselves under the operation of the Winding-up Act.

Mr. Juta applied for an order fixing the time within which all outstanding bank-notes should be presented for payment and all claims proved. The liquidation was a private one, and the present application was made in accordance with a resolution of the shareholders.

Mr. Justice Buchanan said he was afraid the Court had no power to grant the application as prayed for, and suggested, as had been done in the case of the South African Bank, that the parties should apply to be placed under the Winding-up Act.—No order was made.

IN THE ESTATE OF THE LATE JOHANNES B. VAN ZYL.

Mr. Molteno moved, on behalf of Martha Louisa van Zyl, widow of the late Johannes B. van Zyl, for authority to subdivide and transfer to the legatees of the said estate certain defined portions of the farms Grootfontein, Eland's River, and Brak Vlei, situated in the division of Cradock. Provision had been made under the will for the subdivision and transfer.

The Court granted the order as prayed for.

THE PETITION OF CHRISTIAN VENTER.

In this matter, which arose out of the preceding application, Mr. Molteno applied for authority to the petitioner to subdivide and transfer to certain minor children defined shares of property bequeathed to them, with power to sell the same in conjunction with the sale of the portions belonging to the major children.

The order was granted as prayed for, the proceeds coming to the minor children to be handed over to the Guardians' Fund.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION.)

Company—Bank in liquidation—Authority given to Liquidators to accept certain assignments in discharge of assignors' indebtedness to the bank.

Mr. Schreiner, on behalf of the liquidators of the above bank, applied for authority to accept certain assignments offered by Messrs. Arnholz, Stockdale, and Daly in respect of their indebtedness to the bank.

The assignors were indebted to the bank in the sums of £2,763, £8,221, and £460 respectively, and it was estimated that the property assigned would in the first two cases at least realise those amounts. The offers had been made to avoid compulsory sequestration, and they were the best the liquidators could obtain under the circumstances.

The Court granted the necessary authority.

SUPREME COURT.

MONDAY, APRIL 13.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

PAARL FIRE ASSURANCE COMPANY V. GILDENHUYS.

On the motion of Sir T. Upington, Q C., the final sequestration of the respondent's estate was ordered.

STEGMANN V. COHEN.

Insolvency—Securities—Ordinance 6 of 1843, section 30—Where a petitioning creditor had omitted to put a value on securities in his possession the Court refused to make an order for compulsory sequestration.

Mr. Searle appeared for the applicant.

Mr. Juta for the respondent.

This was an application for the compulsory sequestration of the respondent's estate by reason, as it was alleged, of his having preferred certain creditors, and thereby committed an act of insolvency.

Mr. Juta, in opposing the application, contended: (1) That the respondent was not insolvent; (2) that the petitioner was a secured creditor, inasmuch as he held two life policies, one on the life of the respondent for £500, and another on that of his wife for £250, besides having a lien on the furniture for rent; and (3) that the applicant had not complied with Ordinance 6 of 1843, section 30, inasmuch as he had not valued his securities. Counsel also referred to the cases of the "Standard Bank v. Winterbach" (4 Juta, 329), the "Standard Bank v. Kruger & Co." (4 Buch., E.D.C., 47), "Fleming and Mudie v. Van Eyssen" (4 Juta, 366), and "Roberts v. The Cape of Good Hope Bank" (5 Juta, 134).

Mr. Searle, in reply, explained that the applicant had not put a value on his securities through an oversight, that the actual surrendered value of the policies was only £10, and submitted that Section 30 could not have been intended to apply to such cases as the present, in which the securities were merely nominal.

The Chief Justice remarked that no sufficient explanation had been given as to why the securities had not been valued. He was of opinion that the rule established in many of the cases, more particularly in that of Roberts v. The Cape of Good Hope Bank, applied, and consequently the order ought to be discharged.

Mr. Justice Buchanan expressed his opinion in similar terms to those of the Chief Justice.

ZEEDERBERG AND DUNCAN V. HALL.

Mr. Gastens moved for provisional sentence on two promissory notes, one for £678 7s. and the other for £607 7s. 11d.—Provisional sentence granted.

IMPEY, WALTON AND CO. V. PERKINS.

On the motion of Mr. Tredgold a decree of civil imprisonment was granted against the respondent.

MOLTENO'S EXECUTORS V. ELLIOTT.

On the motion of Mr. Molteno, the final sequestration of the respondent's estate was ordered.

MUTUAL SOCIETY V. CLAREMONT HALL.

Mr. Graham moved for provisional sentence on a mortgage bond for £1,100, with interest at 6 per cent. from 1st July, 1890.—Provisional sentence granted and property declared executable.

CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. DENEYS.

Company—Bank in liquidation—Compromises—Sanction of Court—Sequestration,

Compromises entered into between the liquidators of a Company placed under the operation of the Winding-up Act and a debtor are merely provisional and are not binding agreements until the sanction of the Court has been obtained.

Mr. Schreiner appeared for the official liquidators of the above bank.

Sir T. Upington, Q.C., for the respondent.

This was an application by the liquidators of the above bank for an order for the final adjudication of the respondent's estate. It appeared from an affidavit sworn to by the liquidators that the respondent was indebted to the bank in the sum of £11,340 in respect of 378 shares, of which he was the registered holder. In respect of this claim Mr. Deneys had entered into an arrangement with the liquidators to assign his estate, and had actually transferred to them certain moneys and shares. Before, however, the liquidators had received the sanction of the Court to this compromise the Court gave judgment in the case of the Cape of Good Hope Bank (in liquidation) v. East, Runciman, and others ("Cape Times" Law Reports. Vol. I, page 73), and the liquidators being desirous of retaining their rights against past shareholders, who had transferred their shares to the respondent declined to accept the assignment and applied for the final sequestration of the estate.

Sir T. Upington, Q.C., in applying for discharge of the order, contended that the liquidators were estopped from repudiating the agreement into which they had entered with respondent, and that they should be ordered to complete the transaction. Counsel further contended that the general body of creditors could in no way be benefited by the sequestration of the estate.

The Chief Justice remarked that the case was peculiar. The liquidators had entered into an agreement with Mr. Deneys to accept an assignment of his estate in settlement of their claims against him, but before the transaction had been finally concluded judgment was given in the case of the Cape of Good Hope Bank (in liquidation) v. East, Runciman and others. To effect such a compromise as the present the sanction of the Court was necessary, but this sanction had not been obtained and consequently there was no binding agreement between the parties. Again, no actual deed of assignment had been executed, and under all the circumstances of the case he was of opinion that the liquidators were not estopped from now applying to the Court for sequestration of the estate. He failed to see that the defendant had been injured by the circumstance that there had been already an assignment, there was no denial that the estate was virtually insolvent, and it could make no difference to Mr. Deneys whether his estate was sequestrated or assigned. The liquidators had a legal right to ask for the sequestration of the estate, and consequently the provisional order would be made absolute with costs.

Mr. Justice Buchanan, in concurring with the judgment of the Chief Justice, remarked that agreements between liquidators and shareholders or others must in their very nature be provisional, and that until the sanction of the Court had been obtained they could not be valid.

SHARIGHT V. ROBERTSON.

On the motion of Mr. Castens, the final adjudication of defendant's estate was ordered.

SMITH V. GLUCKMAN.

On the application of Mr. Maskew, provisional sentence was granted for £168, less £100 paid on account.

WHITE, MULLER AND CO. V. COHEN.

On the motion of Mr. Castens, provisional sentence was granted for £37 14s. 11d.

BIBBEY V. BARNARD.

Mr. Watermeyer moved for provisional sentence, under Rule 329, for £69 8s.—Provisional sentence granted.

WILLIAMS V. SAMUELS.

On the motion of Mr. Meltene, provisional sentence was granted for £30.

ANDERSON AND MURISON V. THE OMARURU GOLD-MINING COMPANY.

On the application of Mr. Schreiner, provisional sentence was granted for £212.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Stephanus François du Toit, Johannes Christian Henning, Johannes Jacobus Norval, Petrus Jacob Christian Mostert, Gysbert Albertus Tiberius Nezar, Simeon Hyams, Pieter Daniel Cronge, and Richard John Berry.

GENERAL MOTIONS.

TAYLOR AND SYMONDS V. SCHUNKE.

Mr. Searle, for the applicants, applied for an order to make the award of the arbitrators a rule of Court, and for the delivery of a bond entered into as security for costs.

Mr. Schreiner, who appeared for the respondent, consented, and the award was made a rule of Court.

DESSAUER V. DESSAUER.

On the application of Mr. Searle, the rule *nisi* was made absolute dissolving the marriage subsisting between the parties.

THE PETITION OF PURDON SMAILES.

On the motion of Mr. Webber, the rule *nisi* was made absolute for the registration in petitioner's name of a certain lot of ground situated in the village of Seymour.

RIDDELL V. RIDDELL.

On the application of Mr. Graham, the rule *nisi* was made absolute dissolving the marriage between the parties.—Mr. E. R. Syfret was appointed receiver to effect a division of the joint estate—costs to be paid out of the wife's share.

FORREST V. OHLSSON'S CAPE BREWERIES.

Mr. Schreiner and Mr. Graham appeared for the applicant, and Sir T. Upington, Q.C., and Mr. Juta for the respondent company.

This was an application for an interdict to restrain the respondent company from obstructing or interfering with the continuous and uninterrupted flow of water from the Newlands Spring over the company's property to the Liesbeek River.

The Chief Justice said that from the affidavits which he had read the applicant's mill appeared to be worked more by steam than by water. He was of opinion that the matter could not be disposed of on motion; an interdict would not be granted, the parties could bring an action, and if the applicant had sustained any damage he could prove for it. Costs to abide the event.

CAPE CENTRAL RAILWAYS (IN LIQUIDATION).

Company in liquidation—Sale of Company's assets—Confirmation—Proceeds to be subject to order of Supreme Court.

Mr. Schreiner appeared for the liquidator Sir T. Upington, Q.C., and Mr. Juta for Mr. John Walker.

This was an application for the sanction of the Court to the sale, by the receiver and liquidator in England, of the property of the company, with power to effect transfer and carry out certain agreements in connection therewith. It appeared from the affidavit of the English liquidator that the terms of purchase were £170,000, viz., £80,000 cash, £50,000 in preferent shares and £40,000 in ordinary shares. No change would be made in the terms of sale except that they would be a little more favourable to the purchaser, and in consideration of this the confirmation was postponed till the 28th May. The applicant further prayed that the money should be deposited in the Bank of England.

Mr. Juta read an affidavit sworn to by Mr. John Walker, who objected to the confirmation of the sale on the grounds that a better price could be obtained, and that the property was at present under offer to the Colonial Government.

Sir T. Upington, Q.C., for Mr. Walker, contended that the sale should not be confirmed, or that if it were, the money should not be deposited in the Bank of England, but in the Standard Bank.

The Chief Justice, in delivering judgment, said that the last time the matter was before the Court there were two circumstances which prevented the Court from granting the confirmation asked for. The first was that it was not by any means clear that a better offer could not be obtained. Plenty of time had been given Mr. Walker to produce a purchaser willing to pay a larger sum, but he had failed to do so. The second circumstance was that it had not been shown to the Court that if the sale were sanctioned it would retain control over the assets in the event of Mr. Walker's being able to prove that he had a preferent claim. These difficulties had, however, now been removed by the action of the English liquidator, in expressing his willingness that the money should be lodged in the Bank of England, in the joint names of himself and the Cape liquidator, to abide any further orders of the Supreme Court. The Court would therefore grant the application as prayed for, the money to be paid into the Bank of England, subject, however, to any further orders of this Court. The costs to be paid out of the assets of the company; Mr. Walker, however, to pay the costs of to-day.

CLAREMONT, RONDEBOSCH, AND MOWBRAY MUNICIPALITIES V. OHLSSON'S CAPE BREWERIES.

Interdict—Nuisance—Brewery Refuse.

Mr. Searle, on behalf of the Municipalities, applied for an interdict restraining the respondent company from discharging refuse matter from the Anneberg Brewery into the Liesbeek River, or into a certain open drain leading to the said river. Mr. Searle, in applying for the interdict, dwelt at great length on the danger to public health resulting from the discharge of the refuse and the pollution of the Liesbeek.

Sir T. Upington, Q.C., with whom was Mr. Juta, whilst admitting that the refuse from the brewery had a most offensive odour, assured the

Court that the respondent company had done everything that modern science could suggest to abate the nuisance. Fresh experiments were now being tried, and it was confidently hoped that some substance would be discovered which would neutralise the offensive character of the refuse. The place that was most complained of was the bridge, and if the Municipality would give the respondent company permission they would lay down pipes at this particular place, and through them carry the refuse to the river.

The Chief Justice said the matter had better stand over till the August term. If by that time the nuisance had not been removed the Municipalities could bring their action, but if in the meantime the nuisance continued to be so great as had been described in some of the affidavits a fresh application could be made to the Court.

Sir T. Upington assured the Court that every possible measure would be taken to remove the cause of complaint.

PETITION OF THE STANDARD BANK.

Mr. Searle moved for leave to attach a certain piece of ground known as High Constantia *ad fundandam jurisdictionem* of this Court in an action for debt to be instituted against one David J. Pullinger, a resident at Johannesburg.

Property ordered to be attached, and leave given to sue by edictal citation.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION).

On the application of Mr. Schreiner, the rule *nisi* was made absolute cancelling three mortgage bonds passed by Charles E. Nicholls and his wife before the Registrar of Deeds in King William's Town in favour of the said bank.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION).

On the motion of Mr. Juta, permission was given to the liquidators to close the bank's premises at East London and other places, and to destroy or otherwise dispose of the books and other documents of the bank relating to transactions prior to the year 1883.

THE PETITION OF DAVID H. OLIVIER AND OTHERS.

On the application of Mr. Searle, the rule *nisi* was made absolute for the correction of a certain deed of transfer relating to the place Heimen's River, situated in the district of Oudtshoorn.

WESTHUYSEN V. HEYNS AND OTHERS.

Mr. Tredgold applied to have the award of the arbitrators between the parties concerning the division of the water of the farm Koudouw made a rule of Court.

Mr. McLachlan consented, and the application was granted.

THE PETITION OF GEORGINA GLADSTONE.

On the motion of Mr. McLachlan, leave was given the petitioner to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce

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SUPREME COURT.

TUESDAY, APRIL 14.

[Before the Chief Justice (Sir J.H. DE VILLIERS) and the following special jury: Messrs. H. Bosloh (foreman), R. Maxwell, B. Phillips, J. R. Ross, H. D. de Koch, W. McKenzie, J. A. Neethling, J. C. O'Riley, and H. Hall.]

WALKER V. THE CAPE CENTRAL RAILWAYS COMPANY, LIMITED, (SIR T. C. SCANLEN, OFFICIAL LIQUIDATOR.)

Declaration of rights—Private Railway Company in liquidation—Director—Agent—Contractor — Lien — Shares — Debentures — Preference — Registration—Accounts — Damages—Costs—Remuneration of Jury.

In this case Sir T. Upington, Q.C., with Mr. Juta, appeared for the plaintiff, Mr. John Walker; and Mr. Schreiner and Mr. T. L. Graham for the defendants, the Cape Central Railways Company, whose official liquidator in the Colony is Sir T. C. Scanlen, M.L.A.

Sir Thomas Upington said, in opening the case, that the plaintiff in this action was Mr. John Walker, who was resident at Mowbray within this colony, and the defendant Sir T. C. Scanlen, who was a mere formal party, being sued simply in his capacity as official liquidator of the Cape Central Railways (Limited), an English company, which, as he should point out, was established in England for the construction of the Cape Central Railways. The case originated in this way. In the year 1883 a Bill was passed by the Legislature of the Colony authorising the Cape Central Railways Company to construct a line of railway from Worcester to Robertson. Subsequently the powers were ex-

tended for the further construction of the line from Robertson to Ashton, on the way to Swellendam. In obtaining the passage of the Bill and in conducting the affairs of the company Mr. Walker was the moving figure. He was in this colony and did the whole work in connection with the passing of the measure. The Bill passed, and it became incumbent upon the company under its provisions to make a commencement of the works on or before the 27th September, 1884. It appeared that the gentlemen who represented this company in London were not in a position—(the members of the jury would remember that at that time the financial affairs of the Colony were not in a very good state) —to procure the necessary funds to carry on the works. If on or before September 27, 1884, they had not made a commencement their powers would have lapsed, and accordingly they adopted the judicious course of getting a few miles of the railway constructed for the purpose of retaining the powers under the Act. Subsequently it was discovered that these gentlemen were not in a position to finance the affair, and towards the end of 1884 the works were stopped for want of funds. Then came a complication. A dispute arose between Mr. Walker, who was the original agent in the Colony for the company, and the company themselves, as to some of the modes of procedure which they were adopting with regard to the issue of founders' shares, to which Mr. Walker objected. The company, however, went on its way, with the result that in February of 1885 the company dispensed with the services of Mr. Walker. They did not seem to better their position by that, however; in fact, they went from bad to worse, and by a minute of the directors, dated December 9, 1885, the resolution dispensing with the services of Mr. Walker was rescinded, the company taking him back, and depending upon him for the purpose of carrying the scheme through. After this, the accounts of the company were looked into, and it was found that they were hopelessly insolvent, the result being that Mr. Walker was obliged to come forward with a sum of £5,000, which his friends supplied him with, for the purpose of paying off the pressing liabilities of the company. Mr. Walker then entered into a contract with the company on the 29th December, 1885. After explaining the contract in detail at great length, counsel went on to say that the quantities priced out were £213,000, but Walker was to receive £255,000 for doing the whole of the work. He was to receive £125,000 in shares or debentures of the company, bearing interest at the rate of £6 per cent. per annum, £75,000 in cash, being the amount of the subsidy given by the Cape Government to the company, and £55,000 in preference shares of the company. The directors of the company, who were really the parties now interested in the action, were gentlemen placed upon the Board for the purpose of financing this business. They might be called the financiers, whilst Mr. Walker was the contractor. Two of the original directors were moved off the Board to allow three nominees of the London financiers to come in, one of these being a partner of Mr. Behr, the official liquidator of the company in England, who was really the moving party in the whole of this suit. These directors were themselves persons, in regard to at least three of them, who were interested in the supply of material to this line of railway, upon a contract which gave them the very neat allowance of 12½ per cent. commission. The financiers were also to receive 12½ per cent. for the money they advanced. Such being the position of affairs, these gentlemen, who were financiers and merchants of the City of London, and no fools, had accounts before them from time to time as to what was going on in this country with regard to the affairs of this contract. Various balance-sheets were presented and passed, and finally an account was framed in April, 1888, as between Mr. Walker and the company, whereby it was found there was due to Mr. Walker £137,018. A meeting of the directors was held, an account was presented, and the company admitted its liability to Mr. Walker for £137,018. These merchants now said they were foolish people who did not know what they were doing when they passed the account. They said they desired to reopen the case, and that the account they passed in 1888 was not true and correct. Accordingly, in December of 1888, they passed a resolution rescinding the passing of the account in April previous without giving any notice to Mr. Walker whatever, and it was now sought to strike out certain items in the account. These were the salient points of the case. There were 47 issues raised, but the practical points in dispute were few and easily understood.

The Chief Justice said it was a pity the issues had not been reduced. There were 67 at first, but he had got them reduced to 47. Still it was a farce to put 47 issues before the jury. It would be utterly impossible for him to explain 47 issues to the jury, for before he reached the twentieth they would have forgotten the first.

Mr. Schreiner: It's not our fault. I don't know what the issues are now.

Sir Thomas Upington: I don't think you do.

Proceeding, counsel said that the plaintiff made another claim for damages sustained by the course the company had taken with regard to him. Instead of getting 3,000 fully-paid-up shares as he was promised, the unfortunate Walker was placed on the list of contributories to the company in the sum of £33,000 for shares.

Mr. Boaloh (foreman of the jury) said that the

issues were very mystifying to the jurors. Could there not be some reduction?

Mr. John Ross, another juryman, said that it would take an accountant six months to go through all the accounts.

The Chief Justice said that the jury would have to do their best and take the papers to their room, and consult as to the verdict. The case was not a proper one to come before a jury at all, and it was a pity the issues had not been reduced.

Mr. Schreiner said that the defendant did not demand a jury.

The Chief Justice said that if counsel had put their heads together he thought the issues could have been simplified.

Sir T. Upington: The issues were submitted by the other side.

The plaintiff, Mr. John Walker, then went into the box, and was examined at great length by Sir T. Upington. He went into the accounts in detail, and corroborated the opening statement of counsel.

After the adjournment for luncheon,

The Chief Justice inquired if Mr. Walker was the only creditor of the company?

Mr. Schreiner said that there was a claim by the debenture-holders, but except for that the outstanding debts were of no great importance.

The Chief Justice asked if anything had been done in the direction of reducing the issues raised?

Sir T. Upington said he was sorry to say that his learned friend had done nothing except agree to the abandonment of one issue.

The Chief Justice remarked that he should have thought, if counsel had sat down for half an hour and gone over the matter, they could have greatly reduced the number of issues. The Chief Justice then went through the issues one by one, and, by consent of counsel, nine of the issues were struck out of the pleadings. His Lordship remarked that the object of issues was to simplify the pleadings, but in the present case the issues had the effect of rendering the case more and more complicated.

Mr. Walker's examination in chief was then proceeded with by Sir Thomas Upington. The cross-examination by Mr. Schreiner was in progress when

The Court adjourned till Wednesday.

(IN CHAMBERS).

Before Mr. Justice BUCHANAN.]

On the motion of Mr. Searle, Mr. William V. Morkel was admitted to practise as an attorney and notary public.

SUPREME COURT.

WEDNESDAY, APRIL 15.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and a special jury.]

WALKER V. CAPE CENTRAL RAILWAYS—(SIR T. C. SCANLEN, OFFICIAL LIQUIDATOR.)

The hearing of this case was resumed. The plaintiff was again represented by Sir T. Upington, Q.C., and Mr. Juta, and the defendant by Mr. Schreiner and Mr. T. L. Graham.

The cross-examination of the plaintiff (Mr. John Walker) was continued by Mr. Schreiner. Witness said that to a certain extent the contract was speculative, and he was allowed a margin of profit on that account Before the contract was entered into he did not undertake to settle with Firbank & Co for £4,000. He had read the evidence of Mr. Cooper on that point. The extra 2½ per cent. in the contract was put there because he had to make a large payment to Relf out of his own pocket, and not in order that he should pay Firbank. It was utterly untrue that he had agreed to pay out Firbank & Co. He was liable under Schedule B, for engineering expenses, £7,500; he did not see that Cooper's debentures were debited to that account with £7,500. Cooper was paid partly in cash and partly in debentures. He got £8,000 in debentures at one time, and £1,200 at another time. Witness did not issue these debentures to Cooper, and the £4,200 was really owing to him by the company. The accounts were made out from information supplied by the company itself. The company had put the item in the books, and it was responsible, not Mr. John Walker. He did not admit having overcharged £4,200, but he agreed that the debentures issued to Cooper were part of the issue of £125,000. He had not charged the £4,200 twice over. The debentures issued to Cooper were part of the £125,000, as he said, but they were not issued to witness. He must have paid the £4,200, because it figured in the company's books. He must have provided the £4,200, but he could not say to whom it went.

The Chief Justice: Then you say he has charged the item of £4,200 twice over?

Mr. Schreiner: Exactly so, my lord, from his evidence to day.

The Chief Justice: How can it be said that you paid this £4,200, Mr. Walker, if the company paid it? You charged the company with over £7,000 for engineering fees, and it is for you to show how you paid it. If the company paid £4,200 of this £7,000 how can you charge for the full £7,000?

Mr. Walker: Your lordship will look at it in your own way.

In further cross-examination by Mr. Schreiner, the witness said he had no agreement with Firbank except to buy back his debentures. When he went Home in 1887 Mr. Cooper had got a garnishee order for £1,500, and Mr. Cooper would not take the money in debentures unless witness would undertake to redeem them immediately. Firbank's agreement was with the company, but of the £5,000 witness provided in the early days of the company £1,500 went to Firbank, that was clear. He positively asserted that the only agreement he had with Firbank was dated December, 1885, under which he undertook to purchase Firbank's debentures. The company knew nothing about his agreement with Firbank. It was true that it was referred to in two minutes, but at a meeting at which the company's solicitor was present the words "Walker's agreement with Firbank" was crossed out and "company's agreement" inserted in place. This took place January 19, 1887. He did not admit that this referred to a separate agreement between the company and Firbank. Under two orders of the English Court £2,500 debentures were issued. In the terms of the contract he took £1,500 in debentures from Cooper and gave him cash in order to save the company from being wound up. The garnishee order which Cooper had was for £1,500 in cash, and he would have wound up the company if witness had not paid the £1,500. He could not say that the action by Cooper was against the company. He could not have proceeded with the contract at all without assistance. The railway was a venture like, most things in this world. It was not risky but a perfectly safe investment, and he claimed that events proved it. The syndicate were likely to get their money back twice over even if he won this case. He did not say that the obligations to debenture-holders would be satisfied. That would depend upon his (Mr. Schreiner's) costs and others His case was that the financiers would get their money back again and good substantial interest. He could have easily got other help for the project than that which he did get, The financiers had insisted upon taking £76,000 for a debt of £50,000, although the £50,000 included a handsome profit. These gentlemen as the directors had appropriated £76,000 worth of debentures for £50,000 of debt, and that was what he complained of. The £75,000 from the Cape Government passed into the hands of trustees for payments from time to time as the work progressed. After he had entered into the contract he returned to the Cape, having made financial arrangements. Two miles of the work of Firbank had to be done all over again. Work to the value of £3,000 was credited to Firbank. When he was in London he saw that there was some "hanky-panky" about it, and it was agreed that the work should be remeasured.

Mr. Schreiner: You are familiar with that sort of thing?

Mr. Walker: No, but I saw there was something wrong. Witness went on to state, in continued cross-examination, that £3,350 was set down for Firbank's account. Firbank had done certain work, which witness advanced the money to pay for, he receiving in return, from the company, £100 of debentures for every £60 he paid to Firbank. The payment to Firbank was not allowed in Cooper's final certificate of £209,000, although Cooper had said that it was. Cooper made out two certificates, both of which were faulty in this particular. The £3,350 figured in the company's books several times, both to witness's debit and credit. Fairbank's total excavation was only 13,000 cubic yards. His case was that until the final accounts which the directors first passed, the item of £3,350 was never fairly credited to him. He utterly denied that the item was put in twice over. Under Schedule A he was entitled to claim for steam freight.

Sir T. Upington: This is no part of the issues raised.

The Chief Justice: If it is not contained in the issues I certainly rule that it cannot be put.

Mr. Schreiner said that the witness had raised several issues of credit between himself and Mr. Cooper, and the point was important. Would the Court allow an amendment of the pleadings?

The Chief Justice: Certainly not.

Cross-examination continued: Mr. Harris was a chartered accountant, and witness gave him certain information regarding the accounts. The direct information was given by the chairman, Mr. Hazlehurst.

Mr. Schreiner: Mr. Hazlehurst was not called in England?

Witness: No, you said you would call him, but you did not dare do it.

The Chief Justice: Mr. Walker, you must answer the questions put to you,

Mr. Schreiner: Would Mr. Hazlehurst join with you in the new scheme you got up?

Witness: No, he was a shipbroker.

Mr. Schreiner: Well, the other gentlemen were not railway contractors, Mr. Walker. Now was not the company really Walker?

Witness: No, they turned me out of the meetings when they discussed the accounts.

Mr. Schreiner: But you had really *carte blanche* with regard to the work, and the company was practically Walker?

Witness: Certainly not, sir. Continuing, he said that the resolution rescinding the payment of his account was passed upon Cooper's recommendation. Mr. Cooper's final certificate was made out upon the basis of the very accounts wit-

ness now sued the company upon. There was a conflict of testimony on that point between Cooper and himself. Witness's accounts were submitted to the company at a general meeting of the shareholders, and they were passed in their present form, shewing a balance of £137,018 due to him. That was in April of 1888, at a general meeting immediately after a meeting of directors. Shortly afterwards witness left for the Cape, where he was gazetted as the representative of the company. His accounts were passed, and his position as contractor ceased. Then he was appointed a special director to go to the Cape to try and sell the line to the Cape Government. There was no special mission. He was coming home to the Cape, and agreed to try and sell the line, which was then hardly finished. On April 20, 1888, witness sent a letter to the company, suggesting the closing of his contract from the end of the previous year. Five days later he received a note saying that his accounts were passed, that the directors agreed that his contract should cease from 31st December, 1887, and that he was to proceed to the Cape as director to sell the line. At the same time, he had to finish the stations and outbuildings, in his capacity as contractor.

The Chief Justice: How could he fill these two capacities? Continuing, his lordship said that the really important point seemed to be whether or not the plaintiff had a lien on the company's property after the sale had been authorised to the Cape Government. It was questionable whether he could come in as a preferent or concurrent creditor. There was £80,000 to be distributed in cash, looking at the cash alone as an asset, and if this was to be distributed to the debenture-holders, a few thousands more or less to Mr. Walker did not seem to make much difference. What was the total amount of debentures?

Mr. Schreiner: The total issue of debentures was £125,000.

The Chief Justice: If the £80,000 were distributed, I expect there would be a *pro rata* distribution.

Mr. Schreiner: One of Mr. Walker's claims is for £33,000 for damages.

The Chief Justice: The letter seems to show that Mr. Walker gave up the line as contractor and took it over as agent. Where then is the lien? Is that one of the issues for the jury?

Mr. Schreiner: No, my lord.

The Chief Justice: But there is one issue as to whether he did or not actually give up the line.

Mr. Schreiner: That is so.

The Chief Justice: This letter shows that Mr. Walker was anxious to get rid of his dual capacity. He wished to be agent alone.

Sir T. Upington said that the company was asked to take the line over subsequently, but refused. As a matter of fact, Mr. Walker after his return to the Cape continued to do the work of a contractor, only that he had no profit. The company did not take over the line when it was tendered to them.

Mr. Schreiner: My friend refers to the fina completion of the line.

Witness then stated, in further cross-examination, that he collected the revenue of the line, putting in accounts from time to time. Those accounts explained his payments of interest at intervals. He provided cash to pay off the debentures as they were presented. He did not call that providing an account, but it was paying cash, which was very much better. He paid the debenture-holders all their interest to August 1, 1888. The traffic receipts did not furnish all the money, but he paid the rest out of his own pocket. He was aware that in England there had been filed claims amounting to £18,000 for interest, but he did not admit the genuineness of those claims. He had only had issued £111,000 debentures, and had not made the admission that he had received £118,000. He stated on his declaration that he had received £79,650 debentures, but that was a mistake, as only £72,000 were issued altogether. He had given the company credit for more than it had issued. He believed that the whole £125,000 debentures had been issued, but not to him. Of the debentures £5,350 were exchanged for old debentures, £4,000 went to Firbank, £4,000 to Cooper, £1,500 to Harris, and possibly one or two more. These were not issued for his account or benefit. The £5,350 debentures were issued for the benefit of Slade and others. They were issued prior to his contract. He never engaged Mr. Harris, the accountant, and never agreed to pay him, and never did pay him. He was paid in cash and debentures, and witness arranged the transaction, but only at the wish of the company. If Harris said that he was engaged and paid by witness, he was fabricating, though witness did not like using such severe language. It was a clear case of conflict of testimony between Harris and himself. He had objected, in a letter to Sir Thomas Scanlen, to the issue of some thousands of debentures to various directors, on the ground that those gentlemen had received the shares fraudulently, and he still said that the issue was fraudulent. His agent was party to the issue, but he declined to admit that he (his agent) consulted him as to the details of the matter. He had not followed Mr. Behr's evidence all through, because Mr. Behr started from wrong premises entirely. The company was bound to issue £125,000 debentures to him, but it did not do it. At the same time, it was not absolutely fixed that he should be paid entirely in debentures. He could receive part in cash.

After the adjournment for luncheon the cross-examination was resumed. Witness said he had gone into the books during luncheon time, and he

found that with regard to £1,250 for London office expenses in his account, it was not made out by him, but he provided the cash for it. Amongst debentures issued in exchange for old debentures, a number went to the directors in exchange for old ones, but it was not true that the directors in the first instance paid for the old debentures. His contention was that the old debentures were issued without the company receiving any consideration. They were for directors' fees and other expenses of that nature. He had got 32,330 shares, but he refused to give credit for them, because when he received them he believed they were fully paid up, whereas, as a matter of fact, nothing had been paid upon them, and he had been placed on the list of contributories in regard to them. He had received no fully-paid-up shares. He accepted the 32,330 shares as fully paid up, firmly believing that he was responsible for no payments upon them. He was not the promoter of the company, but merely the agent.

The Chief Justice said that as at present advised he should direct the jury to find that the plaintiff had accepted the 32,000 shares as fully paid up. The liquidation proceedings altered the plaintiff's position.

Sir T. Upington said that the company had contracted to supply 32,330 fully-paid-up shares, and had not done so; therefore the company was liable for the neglect.

The Chief Justice was of opinion that the plaintiff had accepted the shares as fully paid up.

Witness stated that had he had the shares by the time mentioned in the contract he could have sold them easily; in fact, he did sell a great number. He blamed the company for wilful delay in the delivery of the shares. He had dealt in some of the debentures, but the purchasers clearly understood that the shares were nothing more than acknowledgments of debt. He did not think there had ever been a time when the shareholders of the company could have received a penny dividend upon net profits after the first preferent charges had been borne. Ordinary shares came after preferential, and at the time his shares should have been issued it could not be said but that there would be a good dividend upon even the ordinary shares. He had not brought his claim against the company in liquidation to any test in England. He had offered to Sir T. Scanlen to submit his claims to arbitration. He had rendered a former claim to Sir T. Scanlen, and very likely the present claim might show an increase upon that.

The Chief Justice inquired if the company had made a tender to the plaintiff?

Sir T. Upington: None whatever, my lord

Mr. Schreiner said that the company admitted that 1,600 shares were due to the plaintiff.

The Chief Justice asked if there had been a money tender?

Mr. Schreiner said no, the liquidator having been unable to make any. The company desired to see Mr. Walker's proofs.

Witness stated that one of his claims for £10,000 for occupation of his private property had been dropped before the commencement of the present action. Mr. Ridings was sent out to the Cape by the company, and although a syndicate of London financiers said they would pay his expenses they were debited as a fact to witness. The company was unable to pay Ridings the £350 he claimed, and witness's friends paid him. He now sought to recover that amount. His claim was outside the contract altogether, but he paid it to prevent the company becoming insolvent. It was a case of Hobson's choice, and he paid the money. Witness explained the appearance of a claim by Messrs. Davis, solicitors, against the company in his case, by the fact that he was asked by the directors to pay the sum in question, £162 10s. He could not find the exact item of £162 10s. in the company's books, but he decidedly paid it on the company's account. Witness paid a number of other sums, particulars of which he entered into, on behalf of the company, to save legal proceedings. He was not aware that his claim as a director had been filed with the official liquidator in England. He was to receive £800 a year as agent. He had to work the line, and claimed to have saved the company several thousands of pounds during the time he managed the concerns. He considered that he was worth £800 a year as agent in addition to £500 for special services as a director.

The Chief Justice said he considered that the £800 a year salary in an important position like that of agent was not excessive.

Mr. Schreiner said that under the articles of association a director proceeding abroad could be given a special reward, but only by resolution, and in this case there had been no such resolution passed or proposed.

Witness said that the item of £200 for office expenses at the Cape was for the rent, &c., of his office. His office, he explained, was in his own house, the best room, and he would be glad to show it to Mr. Schreiner if that gentleman would call upon him. He kept the room specially for the company's work, and charged at the same rate which had been allowed previously for office expenses. His claim for £750 for travelling expenses was chiefly for making two voyages to England and back, both of which were undertaken, however, after the liquidation. He went at the request of Mr. Behr. He charged £250 for expenses in the Colony, for going up the line. On the first voyage he had to take his son, and on the second his wife, owing to his state of health. He got free passes on the Cape Government Railways, but the Railway Department did not feed him.

Mr. Schreiner: Then the £250 is for food?

Mr. Walker: For two and a half years.

Mr. Schreiner: Then there is £50 for law. Very moderate.

Mr. Juta: Very moderate indeed, I think.

Mr. Schreiner said that the money was spent in opposing the liquidation proceedings, and now Mr. Walker asked that, when he had opposed the liquidation, he should make the liquidators pay for it.

Sir T. Upington said that a peculiar point would arise on that. Mr. Behr said in his evidence that he never authorised Sir T. Scanlen to apply for liquidation in the Colony.

Mr. Schreiner: Then there is £150 for cablegrams and petties—a pretty phrase.

Mr. Walker: £106 is for cablegrams, and the rest for sundries.

Mr. Schreiner: Where are the particulars?

Mr. Walker: I don't keep particulars of shillings spent on cabs, stamps, &c.

Mr. Schreiner: But surely an agent at £800 a year doesn't charge without giving particulars?

Mr. Walker: Well, I generally find that in lawyers' accounts there is a good deal for sundries and petty cash.

Mr. Schreiner: To whom were you cabling?

Mr. Walker: To the company; the cables were sent to Mr. Ashton, and by him to the company.

Mr. Schreiner: Where are the cable receipts?

Mr. Walker: I have been in the Colony ten years, and I never got a cable receipt from the postal authorities unless I asked for it.

Mr. Schreiner: In the first account you claimed £600 for the use of tools. In the account after liquidation that swells to £1,000. How do you account for that?

Mr. Walker: There is more time to be added, for which I charged.

Mr. Schreiner: I propose to criticise the first amount of £600, but how in the world it swelled to £1,000 I can't imagine.

The Court at this stage adjourned till Thursday.

SUPREME COURT.

THURSDAY, APRIL 16.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and a special jury.]

WALKER V. THE CAPE CENTRAL RAILWAYS—(SIR T. C. SCANLEN, OFFICIAL LIQUIDATOR.)

The hearing of this case was resumed, Sir T. Upington, Q.C., and Mr. Juta again representing the plaintiff, and Mr. Schreiner and Mr. T. L. Graham the defendant.

The plaintiff, Mr. John Walker, was further cross-examined by Mr. Schreiner. He said that his charge for the use of materials was from January, 1888, to April, 1889. He charged £1,000 in the latest account, but £600 in the former account, the increase of £400 being put in because he found he had previously charged the company too little. It was not true that he had charged this item in two places. The £1,000 was simply for the use of tools belonging to him. None of the maintenance tools were taken over under a former account. He had no particulars to show regarding the cost of these tools, but the sum he charged was below that usually made, and less than that charged on the Cape Government Railways. A list of the tools in use on the line was in the papers before the Court. There was an item of £300 paid to Cooper, but that was not included in the engineering account. It was not true that the company had only authorised one payment of £100 to Cooper, and he considered the company responsible for the money witness paid to Cooper, they having sent him out to the Cape on a special engineering visit. He had made an overcharge of £50 in putting down this £850 paid to Cooper. As a matter of fact, he had paid only £800. The company's books only showed the payment of £60 to Cooper, but the financiers paid four more sums of £60 each, and he claimed that he had been wrongfully held liable for the whole sum of £300, although he had nothing to do with sending Cooper to the Cape. The books of the company debited witness with this £300, but he could not identify the precise items. If the present account was overthrown there were several fresh items to go in, among them being witness's cash advance of £5,000. He had given credit for the whole of the revenue account, and he now claimed that back, having paid off the interest on all the debentures. Part of the debentures were paid here, and part in London, and the company had the particulars in its own books. His payments of interest amounted to £1,938 15s. 9d., but he claimed £1,500 for traffic receipts during the time the line was open. There was a claim of £18,000 by English debenture-holders for interest, but he did not admit its genuineness. His case was that the debentures upon which this £18,000 was claimed were never issued under the terms of his contract. In December, 1877, £77,500 of debentures were unissued, and they were not allotted until August, 1888. If they had been issued so far back as May, 1887, he would have been liable for the interest. After the line was opened to Ashton he ceased to be responsible for interest. He had claimed £7,500 for interest at 6 per cent. upon £137,000, for eleven months, on the balance of his account. His case was that the directors should have kept to their word after passing his accounts in April, 1889. He had no

claim for interest upon debentures issued in August, 1888, because he was not liable for any such interest. There were two items of £594 and £823, but there had been a mistake, £285 having to be taken off the £594, though there were other items he could add, which would more than make up the balance. He was not aware that another item of £14 12s 6d. had been charged twice over. There was an item of £270 for construction pay-sheet, which represented payments he had actually made up to the end of December, 1887, but that sum was not stated twice over. There was a charge for £495 for the maintenance of the whole line during the last three months of 1887, and the item of £270 appeared to have been included in the £823. He claimed £100 damages for the detention of a steam pumping engine by the liquidator. He could have sold the engine, which was four-horse-power, for £100, but the liquidator would not deliver it up, and now he could not find a purchaser. The engine was lying at Ashton on ground plaintiff claimed as his. Whilst witness was away Mr. Syfret detained the engine but afterwards gave it up, whereupon, however, the purchaser declined to have anything to do with it, finding there was a dispute as to the title. The engine was set down in the inventory with the rest of the materials. He had rendered an account supported by vouchers, but he did not deliver up the vouchers, though they were there for Sir T. Scanlen. A certain number of articles were taken over by Mr. Syfret, and witness received £400 for them, though they were afterwards valued at slightly less. Witness had received an account of £120 from Dr. Stevenson for medical attendance to the men on the line. Of this witness had paid £80 or so, the doctor refusing to take the company's undertaking for the money. The stationmaster at Robertson had been instructed to pay witness £18 10s. on account of the medical man's bill, and he considered he had full right to tell the stationmaster to do this, even though it was after liquidation in England.

Re-examined by Sir T. Upington: Witness said that the item of £1,546 for interest from the date of the opening to Robertson was charged under his contract. He was to take the traffic earnings, £1,546, to represent the interest he had paid on debentures. He said that the directors ought to have paid his account when it was passed, and he claimed interest because they had not done so. When the account was made up to the end of 1887, about £12,000 to £15,000 was all that was necessary to finish the line. He was to have been paid £137,000 in cash debentures and shares, and he said that the company had given him 82,330 worthless shares, upon which he had been ordered to pay £82,330 under the liquidation.

The Chief Justice asked if the English Directors had stated, in the course of their evidence, that they were unaware that several items had been erroneously entered by Mr. Walker in the accounts?

Mr. Schreiner: Certainly, my lord.

The Chief Justice: And did they revoke the resolution passing the accounts when the errors were made known to them?

Mr. Schreiner: At once, my lord.

The Chief Justice said it was a legal question if the case could be re-opened after the passing of the accounts.

Mr. Schreiner said that it was a question of mixed law and fact, and the Roman-Dutch law permitted a re-opening of accounts under certain circumstances.

Re-examination continued: Messrs. Fairbridge & Arderne were at one time agents of the company in the Colony. The line had recently been disposed of at a large profit. He accused the company of creating fresh capital without authority. Regarding the engine, it was claimed and inventoried by the official liquidator here, although he had no title to it.

By the Court: He became contractor in 1885, and at once commenced rendering monthly accounts to the company. He did that the whole time until he left the work in 1887. The first report was dated 9th March, 1886, and the last 28th September, 1887.

Mr. Schreiner: No accounts showing the position were ever rendered at all. Merely summaries, in the shape of letters.

By the Court: He had no specimens of the monthly accounts in court, but would obtain some without delay.

Sir T. Upington: I undertake to produce those accounts, my lord.

By the Court: The accounts witness sent were all accepted by the company, and any errors that crept in were rectified.

Mr. Schreiner did not think that accepted was a good word, but he admitted they were received.

The Chief Justice: The question of fact is, did the company accept Walker's account?

Mr. Schreiner: In the sense that they would inquire into it, but no further, my lord.

The Chief Justice: Mr. Walker, can you produce one letter in which the company acknowledges the receipt of one of these accounts?

Witness: There is a bundle of them, my lord. The defendants have got the originals, and we cited them to produce them, but they have not done so. Continuing, witness read two letters of acknowledgment from the company, of his accounts. In one the company took objection to an item of £500, which was rectified in the succeeding account.

The Chief Justice said that, in his opinion, the company had accepted the accounts in every sense of the term.

By the Court: Payments were made by the company on the basis of the schedules A and B, under the contract. Whenever objections were made, they were rectified without delay. The shareholders in full general meeting passed the accounts at £137,000, the directors having just previously also passed them. The letter under which the contract ceased on December 31, 1887, was without prejudice to his rights as contractor for payment of the amount due to him, in spite of the statement it contained, that his dual capacity as contractor and agent should be deemed to have ceased on December 31, 1887.

This concluded Mr. Walker's examination.

Sir T. Upington said he should have to argue that the parties as a matter of fact did not agree to terminate the contract on December 31, 1887, and could not have done so, because on that date the contract was not finished.

The Chief Justice said that the letters certainly agreed to a termination of the contract.

Sir T. Upington said he should have to argue that that was not so, and that the plaintiff continued in possession of the line. Taking the facts, it could not be said that there was a mutual agreement to terminate the contract.

Mr. Patrick Cameron Grant, an accountant, said he had examined the books and balance-sheets of the company, at plaintiff's request. The books were opened in 1885. He compared the balance-sheet put in for 1885 with the entries in the books, and found that it tallied. The balance-sheet for 1886 also tallied with the books. On the 31st December, 1885, the liabilities of the company were £8,268 9s. 1d., including £5,000 advanced by Walker. Up to the end of 1885 £540 had been paid for shares issued. According to the balance-sheet for 1887, Mr. Walker was entitled to £137,025, the difference of £12 being explained by a minute. The first balance-sheet, which did not tally with the books, was signed by Harris, the accountant. That was not a true statement in accordance with the books. He examined a balance-sheet framed by Walker up to the end of 1887 and that was correct, in accordance with the books, in all details. The items of £594 and £828 appeared in the cash-book of the company. He had examined the traffic accounts of the line and the different items were vouched, the balance found due being £823 16s. 6d. The amount passed to Walker in the company's books, up to the end of December, 1887, was £211,556. By the company's ledger of shares 868 shares had been issued to Walker, but the general ledger showed £32,300. The 868 shares were traceable in the share-ledger; 330 were transferred to another person. In December, 1885, £5,350 of debentures had been issued, £1,650 having gone to Walker. Since that date, and up to December, 1887, £24,700 of debentures were issued, of which Walker got £12,950, including the £1,650 of the old issue, these being exchanged for new ones. Then there were £95,000 issued in trust, £25,000 to Fairbridge & Arderne on trust, and £70,000 to certain trustees in London. Of the £25,000 issued to Fairbridge & Arderne Walker got £17,500, and the rest were returned to London to the trustees there. The total value issued to Walker to the end of 1887 was £111,200. The debentures sent to Fairbridge & Arderne were in trust for Walker. The books did not show when Walker got the remaining £75,500. He could find no payment made to Cooper, for a visit to the Cape, in the books of the company. There was no trace in the books of a medical account for the servants of the company on the line. He practised as a sharebroker, but not until 1889. He had no knowledge of the value of the company's shares from his own experience.

Cross-examined by Mr. Schreiner: The share-ledger showed the issue of shares to Ashton, Reid, McKinley, and other directors. He had seen vouchers for every payment made in the books. As an auditor he would accept an endorsed cheque as a sufficient voucher for the due payment of an account. He was mistaken in stating that the books showed no payment to Cooper, £100 having as a fact been paid him.

SUPREME COURT.

MONDAY, APRIL 20.

WALKER V. CAPE CENTRAL RAILWAYS—(SIR T. C. SCANLEN, OFFICIAL LIQUIDATOR.)

The hearing of this case was resumed. The plaintiff was again represented by Sir T. Upington, Q.C., and Mr. Juta; and the defendant by Mr. Schreiner and Mr. T. L. Graham.

Sir T. Upington having put in a number of formal documents, the plaintiff's case was closed, and Mr. Schreiner called Sir Thomas Charles Scanlen, M.L.A., the official liquidator of the company in the Colony, and the defendant in the action. In 1890 Mr. Walker sent in a claim, to which witness replied, and the affidavits supporting plaintiff's claim were filed in September, 1890. He knew nothing about the accounts here, all the books being in London. The plaintiff had furnished witness with no vouchers, but had said he could see vouchers at his attorney's office. He had gone through Mr. Walker's account, marked "C," item by item. The first item was £137,018 17s. 2d., representing the balance said by Mr. Walker to be due to him. Witness had prepared an account showing his view of how that £137,018 ought to be

dealt with. Dealing first with the contract account, it started with the credit for the whole of the work certified by Mr. Cooper, £209,887 8s., for every bit of work done. That showed a total balance due to Mr. Walker of £233,926 13s. 2d. Then he debited Walker with the amount of the subsidy from the Cape Government £75,000, debentures £125,000, and shares £32,300. There was left due to the plaintiff a balance of £1,626 13s. 2d., payable in shares. This excluded the two disputed items of £3,350 and £15,000. Of the debentures, there were first issued 10,300 to Walker, then 22,400 also to Walker, then 77,500 which passed to the trustees appointed to receive them for the purposes of the company. Mr. Walker said that another 2,150 were in addition issued to the trustees, but that was not so; the 2,150 were 43 debentures of £50 each, and he held Walker's receipt for them. The further issue of debentures, to persons already named to the Court, brought the total to 125,000. Of the debentures for £150, issued to Harris, it was proved by the books that they were issued on account of Walker, and the same was true of those issued to Johnson The issue of debentures to Harris was credited to Walker, under the head of sundries, for which a charge of £3,000 odd was made, and the issue to Johnson was comprised in the item for printing and stationery. He knew nothing of the arrangement with Firbank & Co. in England, but he found that 4,000 debentures were issued to them. From correspondence which passed between Tomlin, the secretary of the company, and Walker, it seemed that the debentures to Firbank were issued on account of Walker. There was an account in the ledger for engineering fees. In that account there was an item of £500 brought into the total of £7,000 odd, and from the evidence of Cooper it appeared that this £500 was paid to Walker in debentures. The engineering account gave Mr. Walker credit for all the debentures issued to Cooper. In one account plaintiff debited the company with £2,700, directors' fees, £2,000 of this being for money paid prior to his contract From the books he clearly traced the issue to Mr. Walker of the £5,350 old debentures which that gentleman denied were issued on his account. He traced every debenture of the 125,000 to be issued either to Walker or on his account. With respect to the item of interest, £1,546, no voucher had been given for it, and he could not trace it in the books. Mr. Walker said that the sum was for surplus over traffic earnings, but if so, then the salary due to Walker for the period covered must be deducted, if any such salary were due to him. He had never had a vouched account from Walker of his dealings with the company's property after he took it over, and it was impossible for witness, as matters stood, to verify the accounts of Walker. On the contract account whatever was due was payable in shares. The 77,500 debentures to trustees were issued at various times, as the certificates were framed, but all by August, 1887. In August, 1888, there appeared to have been an adjustment. As the works were from time to time certified, debentures were issued by the company to the members of the syndicate. In England £18,000 for interest was claimed upon these very debentures which Mr. Walker claimed interest upon here. There was an item of £270 1s. for construction pay-sheet, for which he had no vouchers, and that appeared to have been twice charged if it referred to work done during the previous month. An item of £162, due to Davis & Sons, could not be traced in the books as due for any work done for the benefit of the company, and he had seen acceptances for this sum, signed by Walker in Davis & Sons' favour. A sum of £39 1s., due to Fairbridge & Arderne for law costs, seemed to be charged in two places, the same remark applying to a payment of £13 to Jansen, Cobb & Co. An account of one Bayliff, £40 14s. 10d., was also brought up as a second charge after being put in a former account. With regard to Riding's account of £1,100, he could not find that it was authorised by the company. Of Cooper's account, £400 was transferred to the item for engineering expenses. All that the company authorised for Cooper's expenses was a sum of £100 and a draft for £120 for personal expenses. Mr. Walker had claimed £126 for directors' fees. As to travelling expenses, he had never, as liquidator, authorised Mr. Walker to spend money in travelling on behalf of the company after the liquidation. £1,000 was charged for the use of tools and maintenance, but witness had no vouchers at all for it, and it was originally set down by plaintiff at £600, afterwards being swelled to £1,000. As a fact, Mr. Walker was only on the share register for seven ordinary shares, he having transferred the others he had received. Mr. Walker's rights for the debentures he held had never been disputed. Plaintiff had charged £2,050 for twenty-one debentures, instead of £1,050, but whatever debentures plaintiff produced he would be ranked for. At the time of the liquidation of the company in England witness was in possession of the line under Mr. Walker's power of attorney, so that really he had held possession ever since plaintiff went away to England, first as holding Walker's power, and then as official liquidator. Plaintiff gave up the line under protest, however. He could not at present arrive at the true balance due to plaintiff, including interest, because hitherto witness had received no true and proper account of the interest due to plaintiff, if any. The interest account must be taken independently of the contract account. Under the contract interest was payable by plaintiff up to the 30th September,

1887, and he required an account from Walker showing what he had paid. The company was never registered in the Colony as a limited liability company. Witness contended that plaintiff was bound to render proper accounts, in his capacity as special director or agent of the company. Witness was not bound to examine the mass of accounts in possession of the plaintiff's attorney.

Cross-examined by Sir T. Upington: What witness called the contract account was upon the contract between the plaintiff and the company from witness's point of view. There was a difference of 6,500 between the debentures plaintiff admitted receiving and the number witness said were issued to him. On December 31, 1887, the debentures were all out, except 77,500 to the trustees, and 2,150 issued to Walker subsequently. With those exceptions, Walker had the whole issue, 45,350, which would include the old debentures. He was not aware that Relf had received ten bonds of £100 each. The claim for £18,000 interest by English debenture-holders had not yet reached witness, but when it did he should deal with it. Witness had not wiped that claim out in any of his reports as liquidator. On the whole, the conclusion he arrived at was that on the contract there was only due to Walker £1,626. The £5,000 paid by Walker in the first instance was a little difficult to follow, but he appeared to have got back at once £1,057. In Cooper's certificate he could not separate this £5,000, but he believed it was included in it. In the contract itself nothing was included to the effect that Walker had to pay off the £5,350 old debentures. The entries in the books were some of them in Harris's writing, some in Tomlin's, and some in another hand. Harris was appointed by the company, but paid by Walker, as witness contended.

The Chief Justice: This seems to be the most extraordinary company I ever heard of. The company employ Harris to make an audit, and Walker pays. Harris is desirous to get certain information, and goes to Walker for it, and then he makes up the accounts.

Sir T. Upington: When your lordship hears the evidence of the directors it will throw a wholly different light upon the transaction.

The Chief Justice: You said that there was due to the plaintiff on the contract account £1,626 Is that the only amount due, or is there something due on any other account?

Sir T. Scanlen: There is nothing else due, except anything that may be awarded him as agent. Upon the question of interest the balance may be either in his favour or in favour of the company. I cannot say which at the present moment, my lord, because we have never had a proper account rendered by the plaintiff.

The Chief Justice: But before any contract was entered into he paid £5,000?

Sir T. Scanlen: No; it was simultaneous, I think.

The Chief Justice: But was it a bonus to the company?

Sir T. Scanlen: No, it was in part fulfilment of the obligation he undertook by the contract. There is no section of the contract which shows the £5,000 separately. It appears to be paid generally, under the fourth section

The Chief Justice: But unless the balance of £24,000 includes the £5,000, is not Mr. Walker in all fairness entitled to this £5,000?

Sir T. Scanlen: I should be able to show your lordship that some of the items included in sundries, Cape agency, &c., included portion of this payment of £5,000. For instance, there was £1,500 to Relf, which is also put under the head of Act of Parliament. This £5,000 was given for the purpose of discharging liabilities enumerated in the contract.

The Chief Justice: Do you object to his charging £800 a year for his services?

Sir T. Scanlen: No. I think it is rather high, as your lordship only allowed me £360 a year for managing the line.

The Chief Justice: Yes, but he would have more work to do. You object to the payment of £500 to Walker as a special director?

Sir T. Scanlen: Yes.

The Chief Justice: What was the capital of this company?

Sir T. Scanlen: I believe a million.

The Chief Justice: And how many shares were issued?

Sir T Scanlen: 545. Mr. Walker was the only one who got shares with the exception of the directors, who got them from Walker.

The Chief Justice: I should like you to make an account tracing this £5,000.

Sir T. Scanlen: I will try, my lord.

Mr. Arthur George Syfret, solicitor, and partner in the firm of Scanlen & Syfret, gave evidence that Sir Thomas Scanlen was appointed official liquidator on July 18, 1889. After the company was placed under liquidation in London Mr. Walker and his claim were under discussion. As the result of a communication witness sent him in April, 1889, Walker went to London to try to bring about an amicable settlement of the case. He had frequent personal dealings with Mr. Walker, and the latter at no time claimed that his travelling expenses after the liquidation would have to be paid by the liquidator. As a fact, Walker was in very bad health at the time the trip to England was undertaken, and he said to witness that it was the very thing to set him up. While he was away witness made him an allowance of £25 a month, for rent of cottages and use

of tanks, trolleys, &c. There was a steam-pump near Ashton Station which Walker's son claimed on account of his father, but witness refused to acknowledge the claim in the absence of full information. He did, however, inform Mr. Walker, jun., that if he chose he could take it away, providing he did so at his own risk and peril.

Cross-examined by Sir T. Upington: The £25 per month continued for seven months, from 18th April to November 18, as shown by Mr. Walker's receipts. Under the inventory everything found upon the railway was included, and he did not remember giving instructions to inventory the goods belonging to Walker separately. He recollected no questions about interlocking points and tents at Worcester, but he believed Walker did claim some tents on the line. The tents and cottages were not included in the £400 witness paid to Walker. He was not aware that a good deal of ordinary plant belonging to Walker was still in the possession of the liquidator. There was no demand made for the steam-pump in July or August, 1889.

Re-examined: Many of the articles placed in the inventory were afterwards specially applied for by the plaintiff, and taken away for use on the Sea Point Railway.

This concluded the personal testimony, and counsel then proceeded to read the voluminous evidence taken on commission in England. The reading commenced soon after two o'clock, and had not concluded when, two hours later, the Court adjourned till Tuesday.

SUPREME COURT.

TUESDAY, APRIL 21.

WALKER V. THE CAPE CENTRAL RAILWAYS—(SIR T. SCANLEN, OFFICAL LIQUIDATOR.)

The hearing of this case was resumed, the plaintiff being as before represented by Sir T. Upington, Q.C, and Mr. Juta, and the defendant by Mr. Schreiner and Mr. T. L. Graham.

Sir Thomas Scanlen went into the box and placed before the Court a statement tracing the disposition of the £5,000 paid by Mr. Walker to the credit of the company in its early days. He found by the company's cash-book that Walker received credit for the payment, and that the money went for various purposes.

By Mr. Juta: £1,500 went to Relf, £1,500 to Firbank, and £500 to Walker himself, the remainder also being traceable in the books. Some of these debts were due by the company before Mr. Walker commenced his contract. Walker himself received a cheque for £1,057 out of the £5,000, which was soon exhausted. He based his evidence upon the books of the company itself.

By the Court: All these items, paid out of the £5,000, were provided for in the fourth paragraph of the contract entered into by Walker.

Counsel then resumed the reading of evidence taken on commission in London. When the reading had continued for two hours,

The Chief Justice inquired of the jury whether they could understand all that was being read.

Mr. J. R. Ross: I am getting in a perfect muddle, my lord.

Another juryman said that it was possible to understand the evidence personally given in the Court, but the mass of documentary evidence was such that it was rapidly driving some of the jurymen crazy.

The Chief Justice: It is very difficult indeed, I am sure.

Mr. Schreiner said that the difficulties to a jury in a case of that sort were, he supposed, almost unexampled, but really the evidence taken on commission in England was part of the case, and had in some form to be put before the jury. If it had not been that there was such an enormous mass of evidence, an endeavour would have been made to print it.

The Chief Justice said that both sides were blameable for the extreme length of the English evidence, and added that the jurors must do the best they could with it.

The reading continued until the afternoon, when Sir Thomas Upington commenced his address to the jury,

The Court adjourned till Wednesday.

(IN CHAMBERS).

[Before Mr. Justice BUCHANAN.

IN THE INSOLVENT ESTATE OF DANIEL J. CONRADIE.

Insolvency—Election of New Trustee—Practice.

Mr. Molteno applied for an order authorising the election of a new trustee to administer the said estate, it now being unrepresented by reason of the death of the first elected trustee.

Counsel having read an affidavit sworn to by Mrs. Johanna Fagan, of Tulbagh, a creditor of the estate, Mr. Justice Buchanan pointed out that the usual practice in such cases was to make an order authorising the Master to call a meeting of creditors to elect a new trustee.

The Court made an order in the foregoing terms

PETITION OF MARY ANN OATES.

Mr. Searle, on behalf of the petitioner, moved for leave to sue *in forma pauperis* in an action against the trustee of her husband's insolvent estate for recovery of certain furniture seized by him and claimed by petitioner, or otherwise for damages.

Counsel informed the Court that he had already certified and asked that a rule *nisi*, returnable on this day week, should be granted calling upon the trustee to show cause why petitioner should not be allowed to sue *in forma pauperis*.

Rule *nisi* granted as prayed for.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION, V. JULIA S. PILKINGTON.

On the application of Mr. Watermeyer, leave was given to issue a writ of execution against the respondent for the sum of £390, being the amount due on calls in respect of thirteen shares in the said bank registered in her name.

REGINA V. JAN ARENDSE AND JOSIAH ARENDSE.

Act 17 of 1867—Evidence sufficient to uphold conviction.

Mr. Giddy appeared on behalf of the Crown, and Mr. Molteno for the prisoners.

This case came under review from a sentence passed upon the prisoners by the Acting Resident Magistrate of Malmesbury. It appeared from the record, which was read by Mr. Molteno, that the prisoners were indicted under Act 17 of 1867 for stealing a sheep and killing it, and were found guilty, and sentenced to six months' imprisonment with hard labour. The evidence showed that the spoor of two men had been traced from the place in which the sheep had been slaughtered to within about thirty yards of the first-named prisoner's house, and that his wife and another woman were seen leaving the house carrying large bundles, which they concealed in a donga some distance away. These bundles were subsequently discovered, and found to contain sheep's flesh which had recently been killed. Upon this evidence the prisoners were convicted.

Mr. Molteno, on behalf of the prisoners, contended that no attempt had been made to identify the spoor as being that of the prisoners, and that certainly as regarded the second-named prisoner there was not a tittle of evidence against him, and that the charge was based purely on suspicion. Under all the circumstances of the case counsel submitted that the evidence was not sufficient to support the conviction, that the sentence ought to be set aside and the conviction quashed.

Mr. Giddy contended that the conviction was right and was justified by the evidence.

Mr. Justice Buchanan remarked that the case depended solely upon a question of fact; the Magistrate who was in the best position to judge of the value of the evidence had believed the witnesses for the Crown. Although the evidence generally was not perhaps as conclusive as it might have been, still he could not say that it was insufficient to support the conviction. The appeal must consequently be dismissed and the sentence confirmed.

SUPREME COURT.

WEDNESDAY, APRIL 22.

[Before the Chief Justice, Sir J. H. DE VILLIERS, and a Special Jury.]

WALKER V. THE CAPE CENTRAL RAILWAYS—SIR T. C. SCANLEN, OFFICIAL LIQUIDATOR.

The hearing of this case was resumed, the plaintiff, as before, being represented by Sir T. Upington, Q.C., and Mr. Juta, and the defendant by Mr. Schreiner and Mr. T. L. Graham.

Sir T. Upington having concluded his address to the jury,

The Chief Justice asked if the jurors had made up their minds with regard to any of the issues submitted for their judgment. If so a great deal of time would be saved by their saying so at once, as it was unnecessary to hear Mr. Schreiner upon any issue upon which their minds were made up against the plaintiff. For instance, had the company accepted the plaintiff's accounts at the general and directors' meetings under a mistake of fact?

The foreman of the jury said that they preferred hearing Mr. Schreiner, who thereupon commenced his address, remarking that he would endeavour to strip it of all unnecessary features and place the issue clearly before the jury.

Mr. Juta having replied on behalf of the plaintiff.

The Chief Justice proceeded to address the jury, remarking, before he dealt with the issues in detail, that the issues were forty-seven in number. He had suggested at first that the number should be reduced, and if it had been the most unreasonable suggestion in the world, he did not think it could have been treated with more contempt than it was. No attempt was made on either side to follow this suggestion, yet subsequently nine of these issues were agreed upon in five minutes, which showed that a substantial reduction might have been made.

The jury then proceeded to consider the issues separately, giving their decision on each. They found that £8,641 1s. 8d. was due to the plaintiff, independently of the shares to which he was entitled under the contract. This sum was made

up as follows: Cash advanced, £295; balance of traffic account, £553 15s. 6d.; salary as agent, £1,200; sundry debentures, £1,350; office expenses, travelling, law, cablegrams, £250; use of tools, £275; total, £3,923 15s. 6d. From this amount £282 14s. 3d. was deducted for cash returns, leaving the balance of £3,641 1s. 3d. The jury also found for £1,626 18s 2d due on the contract payable in shares.

The Chief Justice, in discharging the jury, said that the case had been about one of the most difficult a jury could have entered upon. He then asked counsel if they were agreed as to the remuneration the jury should receive, but obtained a reply to the effect that the matter had not yet been decided.

The Court then rose, judgment being reserved.

Postea (May 22).

Counsel having gone through the various prayers in the pleadings, and the numerous issues submitted to the jury,

The Chief Justice delivered judgment. His lordship said that judgment would be given for the plaintiff upon the claim in convention, for fully-paid-up shares of the nominal value of £1,626 18s. 2d., and also for £2,291 1s. 3d. The Court declared that the debentures of the company did not constitute a preference upon the assets of the company, but must rank *pari passu* with the said sum of £2,291 1s. 3d. Right was reserved to the plaintiff to prove against the company, for debentures to the amount of £1,350, or such further debentures as he might lawfully hold. Judgment was given for the defendant company, upon the claim in reconvention, for the sum of £291 7s. 10d.

The greater part of the afternoon was taken up with the argument regarding the question of costs.

Mr. Schreiner in the course of his argument, which occupied over an hour, contended that inasmuch as his clients (the defendant company) had gained a substantial victory with regard to the major part of the plaintiff's claim, they were at least entitled to have the costs divided. Counsel, in his argument, referred to the following authorities: "Jones v. Curling" (13 Q.B.D., 262), "Harris v. Petherick" (4 Q.B.D., 611), "Bankart v. Tennant" (39 L.J., N S., Ch. 809), "Welby v. Brown" (1 Ex., 770), "Spencer v. Hamerton" (4 A. & E., 413), and "Williams v. Great Western Railway Company" (8 M. & W., 856).

The Court, without allowing Sir T. Upington to conclude his argument, gave the plaintiff his costs.

The remuneration of the jury was, by consent of counsel, fixed at one guinea each per diem.

[Attorneys for the Plaintiff - Messrs. Van Zyl & Buissinne.]

[Attorneys for the Defendant Company—Messrs. Scanlen & Syfret.]

SUPREME COURT.

(IN CHAMBERS.)

TUESDAY, APRIL 28.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice BUCHANAN.]

IN THE ESTATE OF MARY ANN HOPKINS.

On the motion of Mr. Graham, leave was given to the curators of the above-named estate to raise by loan on mortgage of the landed property the sum of £300, to discharge certain debts contracted by Mrs. Hopkins before she had been declared a lunatic.

IN THE ESTATE OF THE LATE JOHANNES J. WILKE AND WIFE.

On the application of Mr. Molteno, authority was given to the father and natural guardian of the minors Boshoff to consent to the sale of the landed property in the said estate of which they are co-heirs with the children of the testators, on condition that their share of the proceeds be paid into the Guardians' Fund.

IN THE ESTATE OF THE LATE JEAN PIERRE TIRAN.

Curator ad litem—Minors.

In an action for damages about to be brought against executors testamentary for negligence in realizing the landed property of the estate, the Court refused to put Minors to the expense of a *Curator ad litem* where the widow and the major children were in a position to bring the action, and at the same time protect the interests of the minors.

Mr. Tredgold applied for the appointment of a *curator ad litem* to the minor children of the deceased in an action about to be instituted against the executors testamentary for damages by reason of their negligence in regard to the realisation of the landed property in the estate.

It appeared from an affidavit sworn to by the widow of the late Jean Pierre Tiran, that the estate had been damnified to the extent of £2,500 owing, as it was alleged, to the negligence of executors testamentary, against whom an action was about to be instituted, and as the minors were interested in the action it was thought desirable that they should be represented by a *curator ad litem*.

The Chief Justice remarked that the widow and the major children could very well bring the action and at the same time look after the interests of the minors. He saw no reason to incur the additional expense of appointing a *curator ad litem*. No order would be made.

OATES V THE TRUSTEE INSOLVENT ESTATE OF OATES.

On the motion of Mr. Searle, the Court made absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action for recovery of certain household furniture, or otherwise for damages.

Mr. Searle was appointed counsel and Mr. J. Hamilton Walker attorney.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION), IN RE ARNOLZ.

Insolvency—*Curator bonis*—Where a provisional order for sequestration had been granted and a *curator bonis* appointed, the Court refused to confer upon the *curator bonis* the powers of a provisional trustee pending the provisional order being made final.

Mr. Juta, on behalf of the liquidators of the above bank, applied for authority to enable the *curator bonis* of the estate of Mr. Arnolz, of Victoria West, to collect accounts, sell perishable stock, and generally manage the business, pending the provisional order for sequestration being made final.

The Chief Justice remarked that it was not the practice to appoint a provisional trustee until the final order for sequestration had been made. The present application was an ingenious attempt to get the Court to confer upon the *curator bonis* the powers of a provisional trustee. There were no special circumstances in the present case for conferring these powers on the *curator bonis*, and as the return day of the summons was near at hand, no prejudice could be occasioned to parties interested by the business remaining closed in the interim.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION).

Mr. Juta presented, for the confirmation of the Court, a list of compromises entered into between the liquidators and debtors of the bank.

The required confirmation was given.

WRIGHT V. WILLIAMS.

This case (the facts of which appear *ante* p. 33) was before the Court on the 25th February last, but the Court deferred giving judgment until it had heard the evidence of the defendant, who was at sea.

Mr. Graham now informed the Court that the defendant had presented himself for examination.

Captain William Howard Williams, in answer to the Chief Justice, said that he was not present at the hearing of the case, because he only received the summons at nine p.m., and he had instructions to sail at six a.m. on the following morning, so that he had not even time to instruct an attorney. Witness further stated that he never promised Wright "lay." He spoke to all the men whom he engaged collectively, and told them that if they worked well and behaved themselves they would get "seal" money. Wright did not behave himself well, and after his return to Cape Town he wanted double what he would have been entitled to if he had conducted himself in a proper manner.

Cross-examined by Mr. Attorney Du Preez: He did not ask Quine to get him a certificated mate; he simply told him to get a mate; a man with a certificate was not necessary. He never promised Wright 4d. a skin for every seal killed, and 15s. on every tun of oil obtained. He had no authority to make any such promise. He made no distinction between the pay of the ordinary seamen and that of a mate. He was present during the hearing of the case of Wright v. De Pass, but he was not called to give evidence. He would willingly have given evidence had he been called. He had been brought before the Magistrate on a charge of assaulting the plaintiff, and was fined 5s., but it was not on that account that he refused plaintiff his "lay."

In reply to the Court, witness stated that he arrived in Table Bay on the 15th instant, and that he was at present under orders to sail.

This concluded the examination. Judgment was again deferred.

Postea (May 15).

The Court delivered the following judgment:

The Chief Justice said: It was decided in the action brought by the present plaintiff against De Pass & Co., that, as seaman, he was not entitled to recover from the shipowners more than was stipulated for by the ship's articles to which he was a party. He now seeks to recover from the present defendant, Williams, the amount which he would have been entitled to receive if his additional agreement with the defendant, as the agent of De Pass & Co., had been inserted into the ship's articles, as well as the costs of the unsuccessful action against that firm. The claim is based upon a contract by which the defendant is alleged to have warranted his agency for the firm, and, in the

alternative, upon a wrong done to the plaintiff by reason of the defendant's alleged false and fraudulent representation that he was authorised by the firm to enter into the agreement on their behalf with the plaintiff. In regard to the first ground, the plaintiff's counsel has relied mainly upon those English cases, of which Collen v. Wright (8 E. and B., 647) was the first, in which the doctrine of warranty in regard to the undertakings of persons falsely professing to act as agents was established. The nature of the obligation of the professed agent in such cases was said by Willes, J., in delivering the judgment of the majority of the judges, "to be well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist." The same learned judge, during the argument, referred to the Code Civil as providing that, if the mandate is submitted to the inspection of the other side, there shall be no warranty implied, "an exception," he adds, "which seems to recognise the general rule," and he proceeds to say that "as that Code is founded on the old French law, and ultimately on the Digest, it is probable that the doctrine is more ancient than is supposed." On reference, however, to the Digest, I can find no authority for such an implied warranty, nor could there, under the Roman law, be any necessity for implying a warranty, seeing that the agent, as well as the principal, was directly liable to third persons contracting with such agent. The agent was not regarded as a mere representative for the purpose of entering into contracts on behalf of his principal. Persons contracting with him had their election, so long at all events as the agency continued, whether they would proceed against him or against his principal. In the Dutch law the change from the Roman to the more modern doctrine of agency was a gradual one, and was not effected without much difference of opinion. In the "Dutch Consultations" (1, 192) the opinion of an eminent advocate is given, to the effect that an agent who has chartered a ship on behalf of his principal is liable for the freight; and "Matthæus" (De Auct, 2, 5, 35) lays down generally that a person who contracts in an official capacity is personally liable on the contract so long as he retains that capacity. "Voet" (14, 3, 6) offers no positive opinion on the subject, but there can be no doubt, from the authorities collected by him, that the better opinion was that the principal alone, and not the agent, is liable, except in three cases, viz.: where the contract was made with the agent in the belief and upon the faith of his being the principal, where the agent professing to act for his principal had no authority so to act, and where the agent had expressly bound himself on behalf of the principal. In these excepted cases the agent would be liable for damages arising from the breach of contract, but could not be compelled specifically to perform a contract, such as a promise of marriage, which the principal alone is alleged to have undertaken to perform in person. In the present case it is clear, from the evidence of Captain Spence, that the defendant had no authority from the firm to enter into the additional agreement sued upon. If, therefore, the agreement was one upon which the firm would have been liable in case the requisite authority had been given to the defendant, there can be no doubt that the defendant, if he did give the additional undertaking, would be liable in damages. This liability would exist, not by virtue of such a warranty or promise as the English law deems it necessary to imply, but by virtue of the rule of our law, that the agent is liable for damages on the contract itself which he has entered into on behalf of a principal from whom he had no authority to enter into such contract. But it has already been decided that the agreement sued upon could not be enforced as against the defendant's principals, namely, De Pass & Co., even if they had authorised him to make it. The ship's articles are silent as to such an agreement, and we are bound by the decision of the Court that the plaintiff had no claim against the firm beyond the terms of the articles. If he had no claim against the firm, he clearly has no claim against the agent of the firm in respect of the agreement itself. Has he any claim for damages against the defendant in respect of his alleged false representation? If the misrepresentation was fraudulently made, the defendant would clearly be liable, and if it was made reklessly, regardless of its truth or falsehood, it was made fraudulently. The representation alleged to have been made was, in substance, that whatever the form of the written contract, the plaintiff would receive certain extra remuneration for his land services on the sealing expedition, and that the defendant had authority from the firm to enter into an engagement to that effect. Upon this question of fact the Court entertained considerable doubt after hearing the evidence given on behalf of the plaintiff. Judgment was therefore deferred until the Court could take the evidence of the defendant himself. We are satisfied after hearing his evidence that his only reason for not defending the action was that he did not receive the summons until he was on the point of starting with his vessel on a coasting voyage, and that he did not enter into the additional agreement relied upon or make the alleged false representation to the plain-

tiff. It is greatly to be regretted that the plaintiff did not in the first instance accept the offer made by the firm of De Pass & Co., for as against the present defendant I am of opinion that he has no claim whatever. The judgment of the Court must therefore be for the defendant.

[Attorney for the Plaintiff—H. P. du Preez.]

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, MAY 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice BUCHANAN.

THE UNION BANK (IN LIQUIDATION).

Mr. Schreiner presented, for the sanction of the Court, certain compromises proposed to be effected by the official liquidators of the above bank with certain debtors thereof.

The Court, after hearing counsel, granted the necessary sanction.

IN THE ESTATE OF THE LATE CHARLES POTE.

On the motion of Mr. Graham, authority was given to the Master of the Supreme Court to call a special meeting of creditors of the insolvent estate of the late Henry Heath, for the proof of debts and election of a trustee.

PETITION OF MAX SCHAKSCO.

On the application of Mr. Searle, leave was granted to the applicant to sue *in forma pauperis* in an action to be instituted against one Emile H. van Noorden, for a declaration of rights, and for an account of the partnership dealings between the parties.

PETITION OF DIRK ABRAHAMSE

Mr. McLachlan, on behalf of the petitioner, moved for leave to sue *in forma pauperis* in an action to be instituted against his wife for divorce, by reason of her malicious desertion and adultery.

Referred to counsel for his certificate.

WILSON V. WILSON AND MINNAAR.

Evidence—Commission *de bene esse*.

Mr. Graham moved for the issue of a commission to take evidence in the suit *de bene esse* at Fraserburg.

Mr. Juta, who appeared for the respondents, consented, on condition that the commission were made a joint one.

The Court ordered a joint commission to issue, as prayed for, and appointed the Resident Magistrate of Fraserburg commissioner.

STEWART V. KINGON.

Practice—Pleading—Bar—Purging default.

Mr. Graham appeared for the applicant (defendant), and

Mr. Shiel for the respondent (plaintiff).

It appeared from affidavit that this action was commenced by a writ of arrest being issued on the 11th February last against the defendant for the sum of £68. The arrest was effected on the same day that the writ was issued, as the defendant was on the point of leaving for England, but on his finding security the defendant was allowed to leave the Colony.

The plaintiff's declaration was filed on the 18th February. The defendant in his plea admitted the correctness of certain items in the account, denied liability in respect of others, and counter-claimed for the sum of £210, less £48, in respect of certain transactions set out in the claim in reconvention. An exception replication and plea was filed on the 11th March last, and after due notice the defendant was barred from answering plaintiff's exception.

Mr. Graham now applied for leave to purge defendant's default, to file his rejoinder, and to have the action postponed until the arrival of the defendant, who is shortly expected.

Mr. Shiel remarked that his client had no desire to take an undue advantage of the defendant, but he was anxious at the same time that the case should come on for trial at as early a date as possible.

The Court, after hearing counsel, granted the defendant leave to purge his default, and postponed the trial of the case till August 1, unless the defendant should return to the Colony during the ensuing term, in which event the case was to be set down for hearing at once, the defendant (applicant) to pay the costs of the present application.

SUPREME COURT.

FRIDAY, MAY 15.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. AARON PLESSIS.

Act 18 of 1873—Sections 2 and 4—Conviction under wrong section.

The Chief Justice remarked that this case had come before him under review from the Resident Magistrate of Worcester. The prisoner was indicted for contravening section 2, sub-sections 3 and 7, and section 4, sub-section 6, of Act 18 of 1873. The prisoner was convicted of contravening section 4, sub-section 6, and was sentenced to two months' imprisonment with hard labour, spare diet, and solitary confinement for two days, and was further required to sign a bond to keep the peace for three months. The Chief Justice said that the prisoner had been convicted under the wrong section, and the sentence would be altered to that of a fine of £1, or in default, one month's imprisonment with hard labour.

REGINA V. HABERKORN.

Mr. Justice Buchanan made the following remarks with regard to this case, which was tried at the late criminal sessions. The learned Judge said that before proceeding with the business of the day he wished to refer to a circumstance connected with the late criminal sessions. Among the cases on the calendar was that of Regina v. Haberkorn, a sailor in the German Navy, who was charged with murder. He expressed his surprise at finding that the prisoner was unrepresented by counsel, as under the circumstances of the case he should have expected that a defence would have been prepared for him. This not having been done, he requested Mr. Graham to defend him *pro Deo*. He had since been informed that some time before the trial the German Consul-General had been under the impression that the accused would be tried, not for murder, but for culpable homicide, and that all steps necessary would be taken for his defence. It also seems that the Consul-General understood that every person charged with a serious crime was by law necessarily provided with counsel to defend him, as is the rule in Germany. He thought it due to Herr Von Treskow to state this, so that any misconception arising out of ignorance of the facts might be removed so far as he was concerned.

PROVISIONAL ROLL.

HARRIS AND CO. V. GRODNER.

Arrest, writ of—Confirmation.

Mr. Juta applied for provisional sentence for £81 5s., and for confirmation of the writ of arrest.

The defendant, who appeared in person, said that he did not know why he had been arrested. He had no intention of sailing for Australia, as had been alleged in one of the affidavits. He was unable to pay the entire debt, but he had made the plaintiffs an offer of £10 which he was under the impression they had accepted.

Provisional sentence granted as prayed for.

RIGAL V. GRODNER.

Mr. Schreiner applied for confirmation of the writ of arrest against the defendant.

The defendant (who was the same as in the previous case) appeared in person, and denied that he owed Rigal anything. He also pointed out to the Court that the writ was issued against Abraham Grodner, whereas his (defendant's) name was Aaron Grodner, although he had a brother whose name was Abraham.

In answer to Mr. Justice Buchanan, defendant said he did not know where his brother was at present.

Mr. Schreiner having obtained leave to amend the writ by substituting the name of Aaron for Abraham, the Court confirmed the writ of arrest, and the defendant left the Court, accompanied by the Deputy Sheriff.

LIEBENBERG V. WESTHUYSEN.

On the motion of Mr. Graham, provisional sentence was granted on an acknowledgment of debt for £448, payable at sight, and on a promissory note for £61.

STEGMANN V. COHEN.

Promissory Note—Provisional sentence—Payment into Court.

Where on an application for provisional sentence on a promissory note, the defendant alleged that he had a claim for damages against the plaintiff, and prayed that the amount of the judgment should be paid into Court to abide the result of the action, the Court refused to accede to the defendant's request and granted provisional sentence.

Mr. Searle appeared for the plaintiff and Mr. Juta for the defendant. This was an application

for provisional sentence on a promissory note for £381 5s.

Mr. Juta, in opposing provisional sentence, remarked that his client had a claim for damages against the plaintiff for unlawfully attempting to sequestrate his estate, and submitted that if sentence were granted the money ought to be paid into court.

Mr. Searle, in reply, pointed out that it was invariably the practice of the Court to grant provisional sentence on a liquid document, and that there were no grounds for departing from that rule in the present case.

The Chief Justice remarked that the defendant was clearly liable, and he could see no reason for making an order that the amount of the judgment should be paid into court, to abide the result of the action which the defendant said he was about to institute. Provisional sentence would be granted with costs.

DE VILLIERS V. BAARTMAN.

On the application of Mr. Molteno, provisional sentence was granted on a promissory note for £640.

BATE V NEL.

Practice—Decree of civil imprisonment—*Nulla bona*—Insufficiency of Sheriff's return.

Mr. Molteno applied for a writ of civil imprisonment against the defendant on an unsatisfied judgment for £179 16s. 8d., and a taxed bill of costs for £135 10s. 7d.

Mr. Searle opposed the application, and offered part payment of the debt, which, however, Mr. Molteno declined to accept.

The Chief Justice, in giving judgment, remarked that as counsel for the plaintiff had declined the terms offered by defendant, the case must be decided on its merits. There had been no return of *nulla bona*: the endorsement on the writ was to the effect that property to the value of £25 had been attached and subsequently released by instructions from plaintiff's attorney. Civil imprisonment was a last resource, and ought not to be had recourse to until every step had been taken to realise the personal effects. In his (the Chief Justice's) opinion, the return made by the Sheriff was not sufficient to justify the Court in granting a decree of civil imprisonment. The application would be refused with costs.

HALL AND CO. V. OCTOBER.

Mr. Shiel applied for provisional sentence on a promissory note for £800 due on the 5th April last.—Provisional sentence granted.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. ARNOLTZ, JUN.

On the motion of Mr. Schreiner, the final adjudication of the defendant's estate was ordered.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. ARNOLTZ AND CO.

On the application of Mr. Schreiner, the order for the final adjudication of the defendant's estate was granted.

SELLAR BROS. V. CRANNA.

On the motion of Mr. Watermeyer, provisional sentence was granted on a promissory note for £59 11s.

CRANKO'S EXECUTORS V. T. J. VAN SCHOOR.

On the application of Mr. Molteno provisional sentence was granted on a mortgage bond for £3,000, less £49 paid on account.—Property declared executable.

MYBURGH'S ASSIGNEES V. KLERCK.

On the motion of Mr. Juta, the order for final adjudication of the defendant's estate was granted.

HIRST V. MULLER, SMITH AND CO.

Ordered to stand over till Thursday next.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Anthony Michael Holtzhausen, Johannes Petrus du Plessis, John George White, Irvine Pascoe Hughes, Jan Barend Pieter Frylinck, Emanuel William Gough, Jacobus Adriaan Louw Momsen, Lawrence & Sons, Edward Augustus Rudd, Petrus Jacobus Maritz, Johannes Hermanus Cloete, and Matthys Michiel Andries de Jager.

GENERAL MOTIONS

PETITION OF FREDERICK JACOBUS VAN ZYL.

On the motion of Mr. Joubert, the rule *nisi* was made absolute conferring upon the Registrar of Deeds authority to cancel a certain mortgage bond for £150, passed in 1857 by the petitioner's father in favour of one Balthazar Klopper, now deceased.

TOPP V. TOPP.

On the application of Mr. Schreiner, leave was granted to issue a commission to take the evidence *de bene esse* of petitioner and her witnesses at Edinburgh.

Mr. William Gardner, sheriff's clerk of Midlothian, was appointed commissioner.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. PORTER.

On the motion of Mr. Schreiner, authority was given to the official liquidators of the above bank to issue a writ of execution against the respondent for £150 in respect of the call on five shares in the said bank, of which he is the registered owner.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. THE EXECUTORS OF VAN LIER.

THE UNION BANK (IN LIQUIDATION) V. WATSON'S HEIRS AND EXECUTORS.

As the issues in these two cases which were before the Court on the 17th and 12th March respectively (C.T.L.R. *ante* 78 and 72) were the same, the Court decided to hear them together.

Mr. Schreiner appeared for the applicants in both cases, Mr. Juta for the executors of Van Lier, Mr. Searle for Watson's heirs, and Sir T. Upington, Q.C., for Watson's executors.

Mr. Schreiner said that in the case of Van Lier he moved on the part of the Cape of Good Hope Bank that a rule already granted should be made absolute, which called upon the defendants to show cause why they should not be called upon to pay, *de bonis propriis*, certain calls of £30 per share. Van Lier left the shares in question for the benefit of the Cape Town Ladies' Benevolent Society, and the dividends were duly paid over.

Mr. Juta read an affidavit of Mr. Harry Gibson, to the effect that at the time when the estate was liquidated the said bank was in a flourishing condition, the assets being more than sufficient to meet the liabilities. There was then no human probability that the said bank would at any time be placed under the Winding-up Act. The terms of the ordinance were duly complied with when the estate was liquidated, but no claims were then lodged by the said bank.

Mr. Schreiner then formally moved, on behalf of the Union Bank, for an order against the heirs and executors of the late Thomas Watson.

Mr. Justice Smith: There was nothing in the will of Van Lier authorising the trustees to hold the shares?

Mr. Schreiner: Yes; they were not to sell or dispose of them.

The Chief Justice: Strictly speaking, the executors are not now asked to pay *de bonis propriis*. They are only asked to pay the money to the liquidators. We could not well hold them liable *de bonis propriis* as if they had neglected their duty by not selling the shares.

Mr. Schreiner said that the executors could not be heard to say that their account of the money was that they had paid it to the heirs.

The Chief Justice: It is not now, strictly, an application for payment *de bonis propriis*?

Mr. Schreiner: Yes, my lord, because they have made a return of *nulla bona*. I shall be able to show that the course we are taking is the one usually taken in these cases against executors in England.

Mr. Justice Smith: You say the executors were bound to set aside certain moneys to meet future calls which might arise?

Mr. Schreiner: Yes, and that they took the risk if they did not do so. The proper course is for them now to pay us the money.

Mr. Justice Buchanan: The English cases would hardly apply to some of our Colonial statutes. The English practice is so very different.

Mr. Schreiner said that in Watson's case the history of the matter was that the official liquidators first applied to the Court for an order against the heirs to show cause why they should not be placed on the list of contributories, making them jointly and severally liable for the payment of £7,500, less £425 17s. To the applicants it did not matter which of the parties paid.

The Chief Justice: Anything against the heirs would be by action. They could not be put on the list of contributories.

Mr. Schreiner: That would be so in any new case, but it will be remembered that this case was commenced before the Court gave an indication of its present view.

The Chief Justice: It seems clear in the present case that they cannot be placed on the list as heirs but they might be held liable by an action.

Mr. Schreiner said that it was desired by no one to merely shift the method of arriving at the legal position.

The Chief Justice: If you get a judgment placing the executors on the list of contributories that is all you want. You can leave it to the executors to fight it out with the heirs.

Mr. Schreiner: Oh yes; they are all good people, and able to pay. The evidence shews that about £5,000 was paid to each heir, and now there is a claim for £7,500, of which £425 17s. has been satisfied.

Mr. Justice Buchanan: I suppose there may be a subsequent call?

Mr. Schreiner: It is possible, my lord.

Sir T. Upington said that, immediately after their appointment, the executors caused a notice to be inserted in the *Government Gazette* and other newspapers, in 1884, calling upon all persons having claims to send them in to the executors, but no claim was then made by the Union Bank, nor had the executors knowledge of the existence of any debt until July, 1890. They had filed no fewer than ten liquidation and distribution accounts in the estate of the late Thomas Watson, and prior to the final distribution of the funds these accounts were duly advertised and not objected to. The executors had from time to time endeavoured

to sell the shares, by public auction on the stoep of the Commercial Exchange and through brokers, but failed to do so. The executors also called upon the heirs to take over the shares, but they declined to do so. After the death of Thomas Watson the chairman of the Union Bank purchased a large number of shares, and the executors had no reason to doubt the soundness of the bank.

Mr. Schreiner read the affidavit of Mr. George William Steytler and Mr. Harry Gibson, to the effect that between 1884 and 1890 there were large transactions in Union Bank shares. Business was particularly brisk during 1888 and 1889, when some seventy transactions took place.

Mr. Searle read the affidavit of Mr. Thomas Tennant Watson, a Government land surveyor and one of the heirs, to the effect that shortly after the death of Mr. Thomas Watson a tender of 1s. per share for certain Union Bank shares held in the estate was made, but refused by the directors of the institution. Counsel said that the legal position taken up by the heirs was that they could not possibly be placed on the list.

Mr. Schreiner said that of course if the Court held that the heirs could on no account be placed on the list of contributories, then the remedy would be by way of action.

Sir T. Upington said that in the case of the executors of Watson's estate he contended that there was not the slightest liability upon the executors to pay this money *de bonis propriis*, in the events which had happened. A very wide distinction had to be drawn between the English company law and our own, both as regarded the formation of companies and their winding up. With regard to the latter point, he thought it would be as well if he at once referred to the Winding-up Act in England and that in this colony, for the purpose of drawing a comparison between the position of executors in the two countries. The Companies' Act of 1862 provided that if any contributory died, either before or after he had been placed on the list, his personal representative should, upon certain conditions being complied with, be held liable. There was no such provision in the Colonial law, enabling the Courts to place upon the list of contributories persons in the position of executors. Counsel at great length then read extracts from the English statutes relating to company law and the law regarding executors. He also read a judgment of the Lord Chancellor, to the effect that when an executor had passed his accounts through the Master his liability ceased, and any remedy that existed was against the legatees.

The Chief Justice: Knowing this was an unlimited liability company, ought not the executors to have laid aside certain moneys for the purpose of meeting calls?

Sir T. Upington said no, not unless the Court held that no executors should distribute the assets in any estate whilst one share in an unlimited company remained unsold.

The Chief Justice said that here was an unlimited liability hanging over the head of an executor. Ought he not to settle and realise the shares? If he did not, did he not leave the matter undone at his own risk and cost?

Mr. Justice Smith: Who ought to be liable? The man who has done the wrong; the executor?

Sir T. Upington: I do not say the legatee is liable, but if anyone is, it is he.

The Chief Justice said that the creditors of the bank looked to the shareholders, and when they asked who the shareholders were, they were told that one shareholder was the estate of a wealthy man, named Thomas Watson.

Sir T. Upington contended that the creditors were guilty of negligence in not making inquiries.

Mr. Justice Buchanan: Supposing that when Watson was alive he made a gift of £10,000 to a man, and that when Watson died his estate could not pay the calls on these shares, surely they could not go back and take that £10,000 away?

Sir T. Upington: Certainly not. It would be a monstrous state of things.

Mr. Justice Smith: The obligation in this case was to sell the shares.

The Chief Justice: And some shares were sold, that is clear.

Mr. Justice Smith: I think I am right in saying hundreds of shares were sold.

Sir T. Upington said that there was no evidence as to the consideration which passed for those shares. It would perhaps be found that in nine-tenths of the cases the shares were absolutely made gifts of.

Mr. Justice Smith: It came before the Court in a recent case that Mr. Farmer bought a large number of these shares after 1884.

Sir T. Upington: Yes; but they were from Mr. W. G. Anderson, his own partner.

The Chief Justice: No; most of them came from Mr. Myburgh.

Sir T. Upington said that at any rate nothing was known as to the consideration which passed between the partners. Unless it could be shown that these executors had acted negligently and improperly they could not be held personally liable for the calls.

The Chief Justice said that the onus lay with the defendants. They were sought to be placed on the list, and it was for them to show they were not liable.

Sir T. Upington said that the strong position he took up was that only the estate of Thomas Watson could be operated upon by the liquidators in this case.

Mr. Justice Smith: Whom can you sue?

Sir T. Upington: The legatees.

The Chief Justice: But has not the plaintiff two strings to his bow?

Sir T. Upington: I say no; once the accounts are passed the only remedy is against the legatees. Whether they can be held liable I don't say.

The Chief Justice: The question is, who is to fight it out with the legatees and heirs?

Sir T. Upington then proceeded to refer to the English authorities bearing on the case, and contended that under no circumstances could the executors be held liable.

The Chief Justice: When Mr. Thomas Watson died his estate remained in partnership with the bank. His executors, knowing that there is in existence such a risky partnership, pay out the heirs. Were they justified? That is the point.

Mr. Juta addressed the Court on behalf of the respondents in the case of Van Lier.

Mr. Searle having concluded his argument as to the non-liability of Watson's heirs,

Mr. Schreiner replied at length for the applicants. He said that it was perfectly true the executors had paid £5,000 to each of the Watson's heirs, but they had done so purely at their own risk, if, as was the case, they knew what the ordinance was. Clearly it was the duty of the executors either to sell the shares or, finding that an impossibility, to compel the ten heirs to take five shares apiece. Until they had done that the estate was hung up. Mr. Schreiner had not concluded his argument when

The Court adjourned.

SUPREME COURT.

SATURDAY, MAY 16.

CAPE OF GOOD HOPE BANK (IN LIQUIDATORS) V. VAN LIER'S EXECUTORS.

UNION BANK V. WATSON'S HEIRS AND EXECUTORS.

Mr. Schreiner represented the applicants; Mr. Juta, Van Lier's executors; Sir T. Upington, Q.C., the executors of the late Thomas Watson; and Mr. Searle the heirs in the estate.

Mr. Schreiner continued his argument in reply. He contended that the executors were liable because they made a distribution of assets without having legal power to do so. He referred their lordships, in support of this contention, to the recent case of Hofmeyr (*Cape Times* Law Reports, page 66).

Mr. Justice Smith: In that case the shares were left to Mrs. Hofmeyr.

Mr. Schreiner submitted that if the heirs would not take the estate as a whole the executors ought to have retained possession of the entire estate until they had found someone willing to take the shares up. The heirs were asked to take over the shares. They said they would have the Good Hope shares but not those of the Union Bank. Then the executors ought to have refused to pay over the money without an indemnity for future calls. It was idle to say they did not know there would be a call. There was clear proof of the claim, in the shares themselves. The executors received a certain estate, which they were bound to administer according to law. They were managers to some extent, but also personal representatives of the deceased, as was pointed out in the case of Fisher, in which his lordship the Chief Justice laid down the position of the model executor. The case was not one in which a creditor was seeking judgment. The bank had already got the judgment when the Court authorised the calls. His position was, broadly, that the estate of Watson was already on the list of contributories, and that as the executors represented the estate, judgment had really issued against them. The return of *nulla bona* was no answer to the claim.

Mr. Justice Buchanan said there was a distinct difference between the position of the executors and that of the heirs.

Mr. Schreiner: Decidedly; the executors are on the list.

The Chief Justice said that the Court would be prepared to decide whether the executors were liable *de bonis propriis*. It was quite possible there might be an action against both the executors and the heirs, but what the Court said in the case of Hofmeyr was, that if the heirs were proceeded against they could not be put on the list, but must be proceeded against by some other form of action.

Mr. Schreiner submitted that the bank had double remedies. He did not think there was much sympathy with the heirs in this case. They had received £5,000 a-piece, and were only asked to pay £750 each towards the settlement of their father's debt.

Mr. Justice Smith: Surely they may ask why they are to pay £750 if the executors have not done their duty?

Mr. Schreiner: Oh, yes. When we get our judgment we shall be able to wish both parties God-speed on their respective roads.

Judgment was reserved.

Postea (May 27th).

The Chief Justice remarked that the Court before delivering judgment in this case, would like to see an affidavit from the liquidators setting forth to whom dividends had been paid, and if to

the executors, had they credited the heirs with the amount of the dividends?

Mr. Schreiner informed the Court that Watson's estate had been duly credited with the dividends.

The Chief Justice: We should like to see these facts on affidavit.

Postea (May 29th).

The Chief Justice observed that the Court had given much anxious consideration to this case, and they were of opinion that for the present at least no order should be made on the rule *nisi*. In the present case the executors could suffer no hardship, as in the interim they were in a position to sue the heirs. Cases, however, might occur in which great hardship might be done to executors who had acted in a *bona-fide* manner if no opportunity were given them of suing the heirs for the amount that they had paid over. In the case under consideration time ought to be given the executors to sue the heirs, and consequently no order would be made on the rule until the last day of next term, the 31st August.

Mr. Schreiner asked whether the remarks which had fallen from the Bench applied also to Van Lier's case?

The Chief Justice said that in the latter case a shorter time might be allowed, as he understood the parties were resident in the Colony. There was also the case of the Paarl Bank v. Roux.

Sir T. Upington, Q.C., informed the Court that in the last-mentioned case an action was about to be instituted by the liquidators of the bank against the heirs of Roux.

The Chief Justice remarked that under these circumstances no order would be made on any of the rules until the 31st August next, but in the interim the Court would expect the executors to do their duty and find funds to meet the claims.

[Attorneys for the Union Bank. Messrs. Fairbridge & Arderne, for the Cape of Good Hope Bank. Messrs. Reid & Nephew, for Van Lier's Executors Messrs. Wessels & Standen, for Watson's heirs. Messrs. Van Zyl & Buissinne, for Watson's Executors. Messrs. Reid & Nephew.]

WILSON AND HALL V. WESSELS.

Diamond Mine—Trespass—Act 19 of 1883, Section 76—Statutory rights of owner—Interdict—Appeal.

Sir T. Upington, Q.C., with Mr. Searle, represented the appellants, and Mr. Schreiner and Mr. Molteno the respondents.

Sir T. Upington said this was an appeal from a decision of the High Court of Griqualand in an application made by one Johannes Jacobus Wessels, of Wellington, against the present appellants, Wilson & Hall. A notice of motion was issued, calling upon them to show cause why they should not be interdicted, and restrained from working themselves, or by their agents, in the Premier Mine at Kimberley. The application was supported by the affidavit of a Mr. Marais, who said he was the general agent of Mr. Wessels, of Wellington, the owner and proprietor of the farm upon which the mine was discovered, of which he said Wessels held undisputed title. The affidavit went on to say that a diamond-mine had been discovered on the said farm, and that a number of persons proceeded to the mine and marked out claims, that they continued trespassing on the said farm, with a view to winning diamonds, the property of the applicant Wessels, without his leave or licence, or the consent of anyone having authority under him. Applicant saw among the diggers a number of men whom he knew, and called upon them to leave, but he alleged that the defendant Wilson commanded them to remain, and informed applicant that he (Wilson) had pegged out a claim himself. The affidavit of H. A. Ward was also read by counsel. It was to the effect that twenty people were working at different parts of the mine without consent, which was an act of wilful trespass. The defendant Wilson had informed deponent that he had pegged out a claim, and intended working it whether the owner gave consent or not. Counsel was proceeding to refer to the evidence of further parties, when

The Chief Justice remarked that their lordships had read the affidavits in the case.

Sir T. Upington said then that would shorten matters. The two questions raised in the case, Counsel continued, were, first, as to the rights of the present appellants to go upon the farm at all, and secondly, even if they had no right, whether the proper person to proceed against them was Mr. Wessels. In regard to the first of these questions he might at once state that in view of section 76 of Act No. 19 of 1883, which governed those proceedings, he could not ask the Court to say that the persons who went upon this property had an undoubted legal right to go there, there having been no proclamation of the mine by the Government as a public diggings or mine, and consequently, in his opinion, he might have some difficulty in asking the Court to believe that his clients did not misconceive their legal position in regard to going upon this land. He would like to say that the fact of his making that candid admission did not in the slightest degree trench upon such right as the Government might have to declare this mine to be a public mine under section 76, for he had seen it stated that the effect

of the judgment of that Court would be to hold that the Government, under the circumstances, would have no power whatever to declare the mine a public diggings. That was, of course, perfectly erroneous, and having said that, he wiped away the whole of the first part of these questions, and came to the simple question whether, in the events which had taken place, Wessels or the person who had obtained a concession from him to the minerals and precious stones was the proper party to sustain that proceeding. That was the sole question he should have to trouble the Court with.

Mr. Justice Buchanan: Who is the registered owner?

Sir T. Upington: Wessels, I believe, my lord. I think it must be so, and I shall have to admit it. I shall take it, for the purpose of this proceeding, that Wessels is the registered owner. Proceeding, counsel said that the learned judge in the Court below, in very clearly discussing these two points, held that the first point advanced by the respondents (now the appellants) was untenable, and then proceeded to say that he was of opinion that the applicant Wessels had a clear right to an interdict against the continuance of the trespass. Proceeding to the question of whether Wessels was the proper party to take action, the learned judge discussed such of the Roman-Dutch authorities as he was able to refer to, and also English authorities, and came to the conclusion that Mr. Wessels had the right to apply for an interdict, and that it was not necessary to have before the Court the man Ward, the concessionaire under Wessels. The learned judge further said that there had been a subverting of the soil, and apparently a removal of part of the land. If the public digging was allowed to continue, and indiscriminate working went on, Mr. Wessels would recover his property with the land subverted, and deteriorated seriously in value. Now, if that view could be supported it would be difficult indeed for him (Sir T. Upington) to contend successfully what he was proposing to contend, for if precious stones and minerals belonging to Mr. Wessels were removed from the soil, they being his property, it was a most unfair and improper thing for any man to have done, and the Court would undoubtedly interfere. But if they looked at the facts it would seem that Wessels had no possession whatever. An agreement was entered into between Wessels and Ward, under which Ward was given the refusal of purchase of the two farms, on one of which this diamond-mine was discovered, and here came the question in regard to Ward's rights. He must ask the Court to bear in mind that the application was for an interdict to restrain people from working in the Premier Mine, and the allegation in Marais' affidavit was that Wessels was the actual proprietor of these diamonds, and that was the ground really upon which the application came before the Court below. The agreement, counsel continued, set forth that the farms should not be transferred to the purchaser by Wessels until certain instalments were paid, and that during the twelve months that Ward had the refusal of the farms he should have the right to prospect for diamonds or precious stones, and to open and develop any mine or mines he might discover on any portion of the two farms. In the event of any such mine being opened, Ward agreed to allot to Wessels, senior, and his heirs, executors, and assigns, twenty claims in any such mine. Now he (Sir T. Upington) said that that was an absolute disposal of the property in all these diamonds. As soon as the mine was developed Wessels was to get twenty claims marked off, and that was all.

The Chief Justice: Then do you contend that if a person gives the right to A to dig for diamonds that immediately afterwards all the world may rush in and do the same?

Sir T. Upington said that his contention was that no one had any claim for an interdict restraining persons from taking diamonds away except the person who owned the diamonds and the soil.

The Chief Justice said that surely it made a difference to the owner whether A alone came on to his ground or whether the whole world came. The difference to the owner must be very great.

Sir T. Upington said that the question would be who was in possession of this property supposed to be damaged. There was no serious allegation, he believed, that the farm was really damaged.

The Chief Justice: The mine is part of the farm.

Sir T. Upington: No doubt of it, but the person who has a claim is Ward, and not Wessels.

Mr. Justice Buchanan: But what right have these persons on this ground?

Sir T. Upington said he was not asking that question now. He started by saying he was not prepared to ask the Court to say his clients had any legal right there, but at the same time he contended that Wessels had no right to the farm, except in so far as his twenty claims were concerned, until Ward's period was at an end. He had no possession whatever of the Premier Mine, and no right to step in. Ward was the man.

The Chief Justice said that might be true, and yet Wessels, as the owner, might be entitled to prevent anyone else than the concessionaire coming on the land and digging for diamonds, even if the right of winning diamonds for a period had been given to Ward. But as a fact Ward could only take such diamonds as he might win whilst he held the farm.

Sir T. Upington said that everything was given, and Ward could develop the mine. He could bring 50,000 people into it.

The Chief Justice: Yes, if he could find 50,000 to go, but he is only entitled to the diamonds he may find during his period of occupation.

Sir T. Upington said that they then came to the point why Ward was not brought forward and made a party to the present suit. He had affidavits which showed the true reason. Ward had parted with the rights he had obtained under the concession from Wessels to some extent, because one of the present appellants deposed that permission to dig was given him by a sub-concessionaire.

Mr. Justice Smith: Do Wilson and Hall say Ward has given them the right to dig?

Sir T. Upington said that one of the appellants stated that Welch, a sub-concessionaire from Ward, gave him the right of digging. There were actions of a most important nature pending with regard to Ward's right to these diamonds. Mr. Marais' statement that Wessels was the sole owner of the mine, in face of the agreement with Ward, was astounding. If Ward had given away the bulk of his concession, was it not a great hardship that persons who had obtained the right to dig from sub-concessionaires should be stopped, pending the settlement of these important actions? Mr. Marais had made the remarkable statement that Wessels was the sole proprietor of this diamondiferous soil, but the agreement to which he had referred scarcely bore out that statement. Counsel proceeded to read an agreement made between Ward and one Caprisius, by which the latter was given prospecting rights for five months at the mine, and permission to lay down six washing-machines.

Mr. Justice Smith: It may be that Ward has exceeded his rights.

Sir T. Upington said that Wessels was in Wellington, and Ward left in sole control. Disputes arose between Ward and persons who stated that they held rights from sub-concessionaires. Wessels they knew nothing about; Ward was in possession. He contended that Ward should at any rate have been made a party to that proceeding.

Mr. Justice Smith: Do you contend that Ward has the sole right to the property?

Sir T. Upington: I say he has, Wessels having taken the action he has. Proceeding, Counsel said that if a man, as was done under this agreement, parted with the possession of his property for a certain period to another person, and a stranger trespassed upon that property, the occupier would deal with the trespasser. He asked the Court also to remember that in the case of Hall he stated positively that Welch, a sub-concessionaire from Ward, had given him the right to dig.

The Chief Justice: If Ward had brought the action you would have said it ought to have been brought by Welch,

Sir T. Upington said that supposing in this case it were shown that Wilson had a right to go there, as between himself and Ward, could Wessels go beyond Ward's right? The point he wanted to get at was whether Ward's possession was such as to necessitate his being a party to that action. If the Court were to decide that there was a real injury to the reversion, as it was sometimes called, the case would then be on quite a different basis.

The Chief Justice: But can there be a moment's doubt that there is an injury done to Wessels? The fact that Ward can take as many diamonds as he can win does not allow others to come in.

Sir T. Upington said that if Ward, having the right to go in, gave any number of people sub-concessions, he could not bring any proceeding by way of interdict restraining the persons to whom he had granted such permission.

The Chief Justice said that the limited number of people to whom Ward would grant concessions would not represent as many as if anybody were allowed to rush in.

Sir T. Upington said that the agreement was now running. In the meantime Ward had absolute control, and the question was, whether Mr. Wessels could obtain an interdict which shut up the whole thing, notwithstanding all that Ward had done, and put an end to the very valuable rights of all these sub-concessionaires.

The Chief Justice, in giving judgment, said that the case was so very plain that it was really unnecessary to hear counsel for the respondent. Sir Thomas Upington had with great candour admitted that, in view of the clear provision of the 76th section of Act 19 of 1883, he could not maintain that the appellants in this case were entitled to dig for diamonds upon the property in question until, at all events, the mine had been proclaimed as a mine by the Government, but looking at the affidavits before the Court that was not the view which the appellants had up to the present time strenuously maintained. In Mr. Wilson's affidavit it was set forth that all the conditions necessary for the proclamation of the mine as a public digging had been complied with, and that the mine had been worked and dealt with as a public digging within the meaning of the Act of 1883. Mr. Hall, in his affidavit, said that he had entered the mine and pegged off a claim therein, but was justified on account of the owner or concessionaire having allowed the mine to be worked as a public mine, by allowing more than the number of persons required by the Act to settle thereon. Mr. Hall further deposed that the mine was in all respects worked as a public digging, although not formally proclaimed as such. But the most important provision of the 76th section of the Act of 1883 was entirely lost sight of. It was that the amount of licence money, rent, or royalty to be

paid for every claim should be fixed by the owner of the mine, and he (the Chief Justice) failed to see what right even the Government would have to proclaim this as a public digging or mine, until the owner had fixed upon an amount of licence money, rent, or royalty to be paid for each claim and if the Government had not a right *à fortiori*, these appellants had not the right to go upon private property without the consent of the owners. Indeed, the admission of Sir Thomas Upington clearly showed they had no right whatever, but the technical objection was now relied on that the wrong persons were sued, and that the owner of the property was not to be allowed to obtain an interdict to restrain people from trespassing on private property, because he had given the option of purchase to Mr. Ward. That was certainly one of the most extraordinary contentions ever made in a court of justice. They had hitherto looked upon the owner of the land as the person to warn off all persons wrongfully on that land. It might be quite true that the owner must show that his reversion was injured. He (the Chief Justice) was of opinion that the respondent's reversion, whatever that might be, had been injured by the occupation of the appellants in this case. The owner had given certain rights to Mr. Ward, to dig for diamonds during the time he had for exercising his option of purchase, and Mr. Ward might win many diamonds, and allow others to do so, but that was very different from allowing the whole world to go in and win many more diamonds than Mr. Ward or his sub-concessionaires. It appeared quite clear that the judgment was right, and to some extent even more beneficial to the present appellants than it might have been, because the interdict was granted pending an action to be instituted. The Court would be quite justified in saying that before any action was brought it would order persons who had forcibly taken possession of private property to cease working until the question was decided. However, there was now no appeal against that portion of the judgment, and all the Court could do was to dismiss the appeal with costs.

Mr. Justice Smith said he was entirely of the same opinion.

Mr. Justice Buchanan remarked that he did not think the case was arguable.

The decision of the Court below was therefore upheld.

[Attorneys for the Appellants Messrs. Van Zyl & Buissinne, for the Respondent Messrs. Reid & Nephew.]

In re THE CAPE CENTRAL RAILWAYS.

Company in liquidation—Sale of Company's assets—Confirmation.

Mr. Schreiner appeared on behalf of Sir T. C. Scanlen, official liquidator of the Cape Central Railways; and Sir T. Upington, Q.C., with Mr. Juta, represented Mr. John Walker, a creditor of the company.

This was an application for a final order of Court sanctioning the sale of the Cape Central Railways. An order was granted on the 13th April sanctioning the sale of the line, on condition that the purchase money was lodged in the Bank of England in the joint names of the official liquidator in England and the official liquidator here. A slight variation of the first order was subsequently made, and now it was suggested, because of the state of the English money market, the purchaser hesitated to complete the transaction, taking up the position that he objected to the slightest variation of the order of the Court. The debts of the company in the Cape Colony were £2,187 12s. 11d., including the sum awarded to Mr. Walker in a recent action. The official liquidator, counsel stated, had £7,800 in the Standard Bank, which was more than sufficient to meet all claims, and as the contract for the sale of the line would lapse on the 28th May the Court was now asked to sanction the sale of the line in accordance with the original order.

Sir T. Upington said that the £7,806 would not cover all the claims in the Colony. No less than £10,000 of debentures were held at the Cape. If, however, Sir T. Scanlen would undertake to hold the money now in the Standard Bank he would be perfectly satisfied.

Mr. Schreiner said that such an offer had already been made.

The Court granted the order as prayed, and declined to make any order as to costs.

SUPREME COURT.

TUESDAY, MAY, 19.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

GROOM AND WHITE V. THE BECHUANALAND EXPLORATION COMPANY, LIMITED.

Mr. Searle and Mr. Shiel appeared for the plaintiffs, and Sir T. Upington, Q.C., and Mr Schreiner for the defendant company.

This case, which was partly heard last term came on for further hearing.

Sir T. Upington applied for the postponement of the case until the arrival in Cape Town of Mr. Harman, an important witness.

Mr. Searle opposed the postponement.

The Court, after hearing counsel, postponed the case till Monday, the 1st June, the defendant company to pay the costs occasioned by the postponement.

PHILLIPS V. PHILLIPS.

Mr. Giddy appeared for the plaintiff (the husband); the defendant in default.

The further hearing of this case, which was partly disposed of last term, was resumed.

The Court, after hearing counsel, granted a decree for restitution of conjugal rights, failing which the defendant to show cause on the 1st August why a decree of divorce should not be granted.

VILLA V. VILLA.

Mr. Juta appeared for the plaintiff (the husband); the defendant in default.

This was an action for divorce instituted by Guseppe Villa against his wife by reason of her adultery with certain persons unknown. The parties were married in Cape Town in December, 1889, and some months after the marriage the plaintiff began to entertain doubts as to his wife's fidelity. In November, 1890, Villa and his wife separated, and subsequently in December he found her living in a house of ill-fame in Cape Town.

Evidence having been given as to the suspicious conduct of the defendant, the Court granted a decree of divorce, the defendant to forfeit all benefits under the community.

RUSSOUW V. RUSSOUW.

On the motion of Mr. Castens, the Court made absolute the rule *nisi* dissolving the marriage subsisting between the parties, and giving the mother (the plaintiff) the custody of the children.

IN RE THE ZOUTSPANSBERG PALMIETFONTEIN ESTATE COMPANY.

Company—Bank in liquidation—Proof of debts allowed notwithstanding that period for proof had expired.

On the application of Mr. Tredgold, the Court granted the above-named company leave to file a proof of debt for the sum of £477 8s. 6d. against the Paarl Bank (in liquidation), notwithstanding that the period for such proof expired on the 31st March last.

CAMPAAN V. CAMPAAN.

Mr. Jones moved to make absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties.

The Court made absolute the rule *nisi*, with costs against the husband.

HOPKINS V. HOPKINS.

On the motion of Mr. Schreiner, the Court granted further extension of the rule *nisi* admitting the applicant to sue her husband for restitution of conjugal rights by edictal citation.

PETITION OF MICHAEL CUNNINGHAM.

On the application of Mr. Graham, the Court made absolute the rule *nisi* for the cancellation of a certain deed of transfer of portion of lot No. 124, Rufane Vale, in Port Elizabeth, in favour of James Maloney.

IN THE ESTATE OF THE LATE JOHN BROWN EVANS.

Trustee, appointment of, to administer trust fund constituted by ante-nuptial contract.

Mr. Searle appeared for the petitioner, the widow of the late J. B. Evans, and prayed for the appointment of a trustee to administer the trust fund arising out of a settlement made in the ante-nuptial contract between Edith Mary Partridge (the petitioner) and deceased.

It appeared from affidavit that petitioner was married to the late Mr. Evans in February, 1884. By an ante-nuptial contract the sum of £2,100 was settled upon the wife and was made a first charge on the estate. There were funds in hands to meet the claim, but no trustee had been appointed under the will.

The Court granted the order as prayed for, and appointed the person named in the petition trustee.

BRUNNER V. DE VILLIERS.

Attachment of portion of inheritance to satisfy judgment debt.

Mr. Juta moved, on behalf of applicant, for an order authorising the Sheriff to attach so much of an inheritance devolving upon the respondent, but at present in the hands of the Master of the Supreme Court, as will satisfy a judgment debt and costs in favour of the applicant.

It appeared that the amount coming to the respondent was £322 10s., applicant's claim being for £27 7s. 5d., and the costs of the present application.

The Court granted the order as prayed for.

LIND V. VAN DER VEEN.

Perpetual silence, Decree of.

Where V. had threatened to bring an action against L. for negligence the Court refused to issue a decree of perpetual silence against V. on the latter's undertaking to proceed with the action within a reasonable time.

Mr. Searle appeared for the applicant, and Sir T. Upington, Q.C., and Mr. Juta for the respondent.

This was an application for an order requiring the respondent to proceed with her action against the applicant in respect of her claim for the amount of loss sustained in investments made on her behalf, and failing such proceedings being taken within six weeks, that she might be for ever debarred from bringing the said action. It appeared from the affidavits read that the applicant, who is an attorney practising at Oudtshoorn, had advised the respondent to make money advances on certain securities which it was alleged had proved worthless, or nearly so. In consequence of this the respondent had threatened to institute an action for damages against the applicant, but up to the present she had taken no further steps in the matter. The applicant alleged that the report of this impending action having been freely circulated about the district, was injuring him very considerably in his business as an attorney, and he was anxious that Mrs. Van der Veen should either be ordered to bring her action at once, or that a decree of perpetual silence should be issued against her. The respondent, in an answering affidavit, stated that she could not estimate the damage which she had sustained until the crops in a certain insolvent estate had been valued.

Mr. Searle, in supporting the application, contended, on the authority of Van der Linden (pp. 383, 426), that the respondent should bring her action within six weeks, or be for ever silent. Counsel also referred to the cases of "Bergh v. Smuts" (3 Menz., 583), "Norden v. Kilian and Stein" (3 Menz., 550), "Campbell v. Douglas" (1 Searle, 48), and the "Municipality of Worcester v. Du Toit" (2 Juta, 188).

Sir T. Upington, for the respondent, submitted that so important a decree as that of perpetual silence should not be ordered merely on the vague affidavits which the Court had heard.

The Chief Justice remarked that no order would be made on the present application, but the respondent must proceed with her action at the next Circuit Court, costs to abide the event.

THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION.)

Third Report.

Mr. Schreiner, on behalf of the official liquidators of the above bank, presented the following report (third) for the confirmation of the Court:

1. The liquidators herewith submit the first liquidation accounts of the affairs of the bank brought down to the 28th February, 1891, being the last day fixed by the Honourable the Supreme Court for the filing of claims.

2. The liabilities have been reduced by sets-off to £2,041,381 17s. 1d., as per statement filed herewith. This amount is subject to further alterations by adjustments of accounts.

3. The total amount of claims proved and admitted up to 28th February last was £2,019,717 5s. 4d., and on these claims two dividends aggregating 10s. in the £ have been paid.

4. The amount received on account of the call of £30 per share up to the 28th February last is £264,789 2s. 8d., and including receipts up to the 30th ultimo, £292,902 6s. 11d. There is every prospect of the original £325,000 being reached.

5. The liquidators will have sufficient funds at their disposal to pay a third dividend of 2s. 6d. in the £ on the 1st June next.

6. The premises and furniture belonging to the bank in Cape Town and Graaff-Reinet have been disposed of satisfactorily, viz., the former for £15,000 and the latter for £2,500.

7. The disbursements attendant on the liquidation of an institution having fourteen places of business have necessarily been considerable, and these were further increased by the heavy law costs forced upon the liquidators in the Transvaal, in removing the provisional liquidators appointed in that State and paying the amount fixed by the High Court as their remuneration. The order of that Court appointing us sole liquidators in the Transvaal could not be obtained until 17th November last, when measures were taken for reducing the staffs there, as had previously been done with those in the Colony, to the lowest point consistent with efficiency. This object is being steadily kept in view. The branches at Oudtshoorn, East London, and Queen's Town have already been closed, and those at Graaff-Reinet, Graham's Town, and London will be closed on the 31st instant, and as the liquidation proceeds other branches will soon follow.

8. With the view of facilitating the disposal of the great accumulation of books and papers, the liquidators were authorised by an order of your honourable Court, dated 13th April, 1891, to destroy such books and papers of a date prior to 1888 as may be found of no further use.

9. As several creditors omitted filing their claims by the 28th February last, the liquidators recommend that the time for filing claims be further extended to the 31st day of July next.

10. On the 3rd October, 1890, this honourable Court granted an interdict restraining the Registrars of Deeds in Cape Town, Kimberley, and King William's Town from passing any transfer or bonds by any shareholder in the said bank, or from cancelling any bonds in favour of any shareholder, or registering any cessions of any bond standing registered in the name of any shareholder; also the Treasurer of the Colony from registering any cession of Government debentures or stock registered in the name of any shareholder in the said bank, and the Councils of all Municipalities in the Colony from registering any cession of Municipal debentures or stock registered in the name of any shareholder in the said bank without the consent in writing of the official liquidators. The liquidators now propose that a discharge should be granted by this honourable Court from the operation of the said interdict to all who have paid or satisfied their calls on shares held by them in the bank, and annex hereto a list containing the names of shareholders entitled to receive a discharge, and recommend that an order which can be filed with the respective Registrars of Deeds be granted, discharging them accordingly.

11. Provisional liquidators were appointed here on the 23rd September, 1890, and held office till the 26th March, when the present liquidators took their place.

A letter herewith annexed has been received from three of the said liquidators, raising the question of their remuneration for their services during that time. The Court is respectfully requested to consider the matter, and to award such sum as may appear to them to be reasonable for said services.

12. The liquidators now ask the Court:

(1) To confirm the liquidation account submitted herewith.

(2) To sanction the extension of time for the filing of claims to the 31st July next.

(3) To grant an order discharging certain shareholders from the operation of the interdict of October 3, 1890.

(4) To fix some remuneration for the provisional liquidators.

Mr. Schreiner said he did not ask for any order at present as to remuneration to liquidators.

The Court confirmed paragraphs 2 and 8 of section 12, and made the usual order as to publication.

PIET V. PIET.

On the motion of Mr. Molteno, the rule *nisi* was made absolute admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.

IN THE INSOLVENT ESTATE OF LOUIS J. SCHOEMAN.

On the application of Mr. Watermeyer, the Court made absolute the rule *nisi* for authority to the Registrar of Deeds to pass transfer of the farm Galgenbosch, otherwise Drooge Rivier, and land adjoining, to the purchaser thereof from the said estate.

PETITION OF WILLIAM WHEELER.

On the motion of Mr. Molteno, the Court granted the applicant leave to sue *in forma pauperis* in an action against his wife for restitution of conjugal rights, failing which for divorce.

ABRAHAMSE V. ABRAHAMSE.

On the application of Mr. McLachlan, the Court granted a rule *nisi* calling upon respondent to show cause why applicant should not be admitted to sue *in forma pauperis* in an action for divorce.

REGINA V. MASERI AND RAMSITSANI.

Act 23 of 1879, section 9—Non-compliance with terms of section—Conviction quashed.

Mr. Giddy appeared on behalf of the Crown, and Mr. Juta for the prisoners.

This was an appeal from a sentence of the Resident Magistrate of Matatiele. It appeared from the record that the prisoners were convicted under section 9 of the Vagrancy Act of 1879.

The Court held that the provisions of section 9 had not been complied with, and consequently quashed the conviction.

REGINA V. RUSSOUW.

Act 20 of 1861, section 10—Transmitting false telegrams—Telegraph regulations—*Locus pœnitentiæ*—Conviction quashed.

This matter came on for argument on a point reserved at the last Circuit Court held at Malmesbury.

Mr. Giddy appeared on behalf of the Crown, and Mr. Jones for the prisoner.

The prisoner was indicted, and found guilty of having contravened Act 20 of 1861, section 10, in that on the 9th October, 1890, he caused to be transmitted to Kimberley a certain tele-

message, knowing the same to be false. The only evidence for the prosecution was that of a clerk in the Telegraph Department named Morrell. According to Morrell's evidence, the prisoner handed him a telegraph form with the message written on it. Shortly afterwards the prisoner appears to have changed his mind about sending the wire, and told Morrell not to despatch it. Morrell, however, explained to him that, according to the rules of the service, he could not return a message which had been received over the counter, and consequently the message was sent.

Mr. Jones, on behalf of the prisoner, submitted that the Postmaster-General had no statutory power to issue rules of this nature as affecting the public, and that his action in so doing was *ultra vires*. As between himself and his subordinates in the department, no doubt he had power to make regulations, but these regulations could not affect the general public. In any case the prisoner had exercised his *locus pœnitentiæ*, and the message had been sent against his wish and instructions.

The Chief Justice, in giving judgment, remarked that the point reserved was an interesting one. If the prisoner had knowledge of the regulations referred to in the argument, then his subsequent repentance would not avail him. There was no evidence, however, to show that he was aware of the regulations, and under the circumstances he was entitled to the benefit of the doubt. He had exercised his *locus pœnitentiæ*, as he had a right to do, and he (the Chief Justice) was of opinion that the conviction ought to be quashed.

Mr. Justice Smith concurred.

Mr. Justice Buchanan remarked that, in concurring with the judgment of the Chief Justice, he was not to be understood as implying that the more important point had been decided, namely, whether a person having handed in a message and paying for it had the power of subsequently cancelling the message.

ZAHN V. DU PREEZ.

Account—Action for balance of Summons "sufficiently specific"—Exception—Appeal—Case remitted.

Mr. Schreiner for the appellant, and Mr. Searle for the respondent.

This was an appeal from a decision of the Resident Magistrate of Worcester.

In the case heard before the Magistrate the appellant, Dr. Zahn, sued the respondent for £10, medical attendance on Miss Du Preez. The defendant (present respondent) denied the debt, and took the exception that the summon was not specific enough, inasmuch as it did not allege which Miss Du Preez had received medical attendance. The Magistrate upheld the exception and dismissed the case. From this decision the respondent now appealed.

Mr. Schreiner, in support of the appeal, contended that the Magistrate had erred in not allowing the plaintiff to make his case, and that the summons was sufficiently specific.

Mr, Searle, for the respondent, submitted that the summons was not sufficiently specific, and that the plaintiff ought at least to have mentioned Miss Du Preez's christian name. Further, that when the exception was taken the plaintiff ought either to have applied to have the summons amended or to have produced a witness to identify his patient. Counsel also referred to Act 20 of 1856, section 52, upon which he mainly relied.

The Chief Justice, in delivering judgment, remarked that the Magistrate had clearly erred in upholding the exception. The appeal would be allowed and the case remitted to be decided on its merits.

[Attorneys for the Applicant C. C. Silberbauer, for the Respondent Messrs. Fairbridge & Arderne.]

SUPREME COURT.

WEDNESDAY, MAY 20.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. PIET ARENDS.

Incest—A man who marries or has carnal knowledge of his illegitimate daughter commits the crime of Incest.*

Mr. Giddy appeared for the Crown; the prisoner was not represented by counsel.

This case came on for argument yesterday (May

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* A view of the English Law on this subject may not prove uninteresting. I quote from Stephen—Dig. Crim. Law, p. 118.—Ed.

"Every person who commits *incest*, adultery, fornication, or any other deadly sin (not punishable at Common Law), is liable upon conviction thereof in an ecclesiastical Court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the Court pronouncing the sentence of excommunication may direct."

18 Edw. I., c 4; 53 Geo. III., c 127, §§ 1—3; and see Phillimore's Eccl. Law, 1,081, 1,442: also *Phillimore* v. *Machon*, 1 P.D. 481; Co. Litt. 96 b. *Incest* though not mentioned in the statute "*Circumspecté agatis*," is the only offence which in these days is ever prosecuted under the law here stated. Such a prosecution occurred within the last few years in the Bishop of Chichester's Court. See 2, Hist. Cr. Law 396—429.

19) on a point reserved by his lordship Mr. Justice Buchanan at the last Circuit Court held at Beaufort West. The prisoner was indicted for the crime of incest, in that he had had carnal knowledge of his illegitimate daughter, the point reserved being "whether under the circumstances the prisoner could be convicted of that crime, and whether in fact carnal knowledge on the part of a man with his illegitimate daughter did amount to incest." The jury brought in a special verdict, and found that the girl was the daughter of the prisoner, although there was no evidence that he had been married to the girl's mother, and that he had had carnal knowledge of the girl.

Mr. Giddy, on behalf of the Crown, argued at length that the fact of a man's not having gone through the form of marriage could not affect the blood relationship which existed between himself and a daughter born of him while he was living in a state of concubinage, and that if a man had carnal knowledge of his natural child, under such circumstances he committed the crime of incest. In support of his contention counsel referred to Matthæus de Criminibus, "Regina v. K" (Buch. Reps., 1875, p. 98), and "Regina v. The Inhabitants of Brighton" (30 L.J., N.S., M.C., 197).

The Court reserved judgment.

This morning (May 20) the Chief Justice, in delivering judgment, detailed the facts of the case, and remarked that very few authorities had been quoted in argument. After the adjournment yesterday he had looked up some of the authorities, and as the main point which they had to decide was whether a man could marry his illegitimate daughter the following passage from Voet (23, 2, 35) bore directly on the point: "Nor do marriages appear to be permitted between a defiler and such a relation by blood of the woman defiled as would, if instead of illicit intercourse there had been marriage, have been prevented from marrying him on account of affinity arising out of such marriage, nor *vice versa* between the woman and a similar relation by birth of the defiler; provided only there were undoubted proof of the illicit intercourse. At any rate it is certain that blood relationship arising not only from lawful marriage but from illicit intercourse is an impediment to marriage (Dig. 23, 2, 54). It makes no difference whether the relationship arises from marriage or not, for a man is prohibited from marrying his sister who has been begotten of a prostitute. . . . All this quite agrees with the modern view that marriages are condemned where there is any relationship arising out of illicit intercourse (Carpz Def. For, p. 4, c. 23, def 10), and this view is clearly adopted by the Echtreg Court of the Staten-Generaal, 18th March, 1656, art. 63-65 (2 Plac. B. 2,441)." In view of this authority he (the Chief Justice) was clearly of opinion that by our law the marriage of a man with his illegitimate daughter was forbidden. According to Voet, there must be clear proof that blood relationship does exist. In the present case the jury had found that the girl was the prisoner's daughter, and that he had carnal knowledge of her. Such being the case, the prisoner was rightly convicted. The point reserved must be decided against the prisoner, and the conviction upheld.

Mr. Justice Smith concurred.

Mr. Justice Buchanan remarked that he had reserved the point at the trial of the case at the last Circuit Court held at Beaufort West. He knew that English common law did not recognise the crime of incest, and was under the impression that by Scotch law the circumstances in this case would not have been punished. The reference to Allison (made by Mr. Justice Smith) showed that under Scottish law the prisoner would not have been punished. The only Dutch authority he could refer to on Circuit was Van der Linden, who only dealt with the subject in general terms, and the reference in Voet was only clear where there was blood relationship, and not affinity. Prisoner had been undergoing his punishment since the passing of sentence.

MYEKULU v. SIMKINS.

Attachment—Illegal—Messenger of Court—Act 20 of 1856, section 53—Magistrates' Court Regulations—Rule 58—Interpleader—Action—Appeal.

Mr. Schreiner appeared for the appellant.

This case, which was argued yesterday (May 19), was an appeal from a decision of the Resident Magistrate of Queen's Town. The appellant (the plaintiff in the Court below) had sued the respondent for the delivery of certain three head of cattle unlawfully attached by the defendant, the messenger of the Court, in satisfaction of a judgment which had been obtained against the appellant's son, Benjamin Myekulu, in the Resident Magistrate's Court of Wodehouse, and also for £5 damages in consequence of the illegal seizure and detention. The Magistrate dismissed the case on the grounds that the defendant, the messenger of the Court (through his deputy), had acted *bona fide*, and had not been guilty of negligence in seizing the cattle in question. From this judgment the plaintiff now appealed.

Mr. Schreiner, in support of the appeal, contended that there had been gross negligence on the part of the respondent, inasmuch as the appellant had pointed out to the former that the cattle which were being seized were his property, and

not his son Benjamin's. Counsel further contended that when the question of ownership by a third party was raised, the Magistrate ought to have ordered interpleader proceedings—"Louw v. Fife." (2 Juta, 65). Counsel also referred to Act 20 of 1856, section 53, and directed the attention of the Court to the English law on the subject of the liability of sheriffs in cases similar to the one under consideration, referring more particularly to "Addison on Torts," 4th ed., p. 650, and to the following cases: "Jarmain v. Hooper" (6 M. & Gr., 847), "Dawson v. Wood" (8 Taunton, 260), "Glasspoole v. Young" (9 B. & C., 701), and "Olivier v. Keating" (Foord's Reports, p. 102).

The Court reserved judgment.

To-day (May 20) the Chief Justice delivered the following judgment: He said he was clearly of opinion that the Magistrate had erred. The defendant, the messenger of the Court, attached certain property belonging to the plaintiff, having at the time had notice that the cattle were claimed on behalf of the plaintiff. Notwithstanding this notice, he proceeded with his attachment, and gave notice to the Magistrate. Now, the duty of the Magistrate on receiving the report of the messenger was, under the 53rd section of Act 20 of 1856, and the 58th rule of Magistrates' Court Rules, to have issued an interpleader summons to decide the question of ownership. If such a summons had been issued, the effect would have been to stay all proceedings which might be brought in that or any other court against the messenger for illegal attachment. Instead, however, of going on with interpleader proceedings, they were dropped on account of a notice given by plaintiff that he intended to bring an action. This was where the Magistrate and the messenger had erred. The messenger ought to have put the law in motion, and the Magistrate to have issued the interpleader quite independently of any action being brought by the plaintiff. If the interpleader had proceeded this particular action would have been stayed, and all costs incurred would have had to be paid by the plaintiff. But the interpleader not having been issued, the plaintiff was justified in proceeding with his action against the defendant, and entitled to judgment, inasmuch as it was quite clear that the cattle belonged to him and not to the judgment debtor. The Magistrate therefore erred in not giving judgment for the plaintiff. He ought to have given judgment for the delivery of the cattle or their value, and for such damages as he might find the plaintiff had sustained. The Court were of opinion that no serious damage had been sustained by the appellant, and that 10s. would be sufficient damages under the circumstances. The judgment ought, however, to be altered to one of judgment for the plaintiff for re-delivery of the cattle or their value (£15) and 10s. damages, with costs in this Court and in the Court below. Practically the appeal only came on the question of costs, as Mr. Schreiner had admitted that the cattle were delivered after judgment.

[Attorneys for the Appellant Messrs. Scanlen & Syfret].

PREISS V. GLUCKMAN.

Waggons—Contract to make—Delivery—Acceptance—Workmanship—Action.

Mr. Juta and Mr. Jones appeared for the plaintiff, and Mr. Schreiner and Mr. Thorne for the defendant.

This was an action instituted by the plaintiff, a wagonmaker of Robertson, against the defendant, a trader of the same place, for the sum of £242 14s. 10d. with interest *a tempore moræ*. It appeared from the declaration that on the 18th December, 1889, the parties entered into an agreement by which the plaintiff was to make for the defendant as many wagons as he could during a period of one year, reckoned from February, 1890, the defendant to supply the materials and the plaintiff to receive £30 for each wagon. Acting under this agreement the plaintiff made thirteen wagons, of five of which the defendant accepted delivery, and paid plaintiff the sum of £190. The other eight wagons defendant refused to accept on the grounds that they had not been turned out in a good and workmanlike manner. Plaintiff, in addition to the balance of account due in respect of the wagons, namely, £200, claimed the sum of £42 14s. 10d. for work done and money and materials supplied, either to the defendant or to his duly-authorised agent. The defendant, in his plea, denied that the wagons had been completed in a proper and workmanlike manner, in accordance with the terms of the contract, and alleged that the cost of completing the work would amount to £80. Defendant further alleged that he had hired the services of the plaintiff to make the wagons in question out of the material supplied by him (defendant), and that he had actually paid plaintiff £202, and not £190, as plaintiff stated. Defendant also counter-claimed for the sum of £80.

Upon these facts and pleadings issue was joined.

Mr. B. Preiss, the plaintiff, examined by Mr. Juta, detailed the circumstances connected with the making of the contract, and stated that the wagons were made in a workmanlike manner, and were as good as could be expected, considering the inferior material, namely, green wood, with which he had been supplied by the defendant. The woodwork of the wagons had shrunk in some places, and a few of the tires were loose, but this

was partly due to the long time the wagons had been exposed to the sun and rain.

Cross-examined by Mr. Schreiner, the witness stated that he had no recollection of having seen an account in Mr. Cilliers's office, nor did he remember entering at all into the question of accounts. Defendant had done very well out of the five wagons which he took to the Free State, some of them having been sold at prices varying from £135 to £150. Defendant would have taken the other eight wagons if he (witness) had consented to give him three months' credit. In January the wagons were as good as they could be, considering that they had been made of green wood. The wheels that were not exposed to the sun were quite good still. He knew a Mr. During, a wagonmaker residing in Robertson, but he did not know what opinion he had formed of his (plaintiff's) work; but this much he did know, that it was very easy for one man to find fault with another man's work. Since January the wagons had got into bad condition. The wings had been properly made and were about three inches from the wheels. The defendant and Cilliers thoroughly examined the wagons, but the latter came with the intention of finding fault so that legal proceedings should result.

Re-examined by Mr. Juta: Green wood only costs about half the price of well-seasoned wood. Some of the tires supplied were short and he had to lengthen them. Wings were made of various breadths by different wagonmakers.

The correspondence which had passed between the parties was then read by Mr. Juta and put in.

The hearing of the evidence had not concluded when the Court adjourned.

SUPREME COURT.

THURSDAY, MAY 21.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

PREISS V. GLUCKMAN.

The further hearing of this case was resumed this morning, the plaintiff being represented as before by Mr. Juta and Mr. Jones, and the defendant by Mr. Schreiner and Mr. Thorne.

Mr. William Segar, a wagonmaker, residing in Robertson, examined by Mr. Schreiner, stated that in his opinion the wagons had not been turned out in a workmanlike manner. He had carefully examined the wagons, and he did not think that, in their present condition, they were saleable. He would be very sorry to turn out such specimens of work from his shop. The spokes were loose, and the wheels generally were in such bad condition that it would be impossible to take the wagons on a long journey. He thought that on an average the cost of putting each wagon in proper condition would be from £8 to £10. He personally would not undertake to put them in saleable condition for less than £80

Cross-examined by Mr. Juta: He learned his trade in England. He did not work at it after his arrival in the Colony, but during the past two years he had been working as a wagonmaker. He was not an architect, and was not aware that he was known as "the architect" in Robertson. Architects do not serve an apprenticeship. [Mr. Juta: No; I suppose they are born, like poets.] He (witness) had seen the wagons in January last, and in some respects he thought they had improved since that time. The wings were about an inch from the wheels. If they had been properly made they ought to have been at least four inches distant.

In answer to the Court, the witness stated that he had examined the wagons at the request of the defendant, and that the plaintiff was in his shop at the time.

Several other witnesses were called, and they all agreed with Mr. Segar that the wagons had been badly made, and were at present in a wretched condition.

The plaintiff, on being recalled by the Court, stated that the wheels were painted by men employed by the defendant, who at that time raised no objection to the quality of the work.

The defendant, however, on being recalled, denied this statement.

After hearing counsel, the Court gave judgment for the plaintiff for £190 and costs.

[Attorneys for the plaintiff Messrs. Findlay & Tait, for the defendant Messrs. Van Zyl & Buissinne.]

PROVISIONAL ROLL.

ESTATE ROBERTSON AND BAIN V. DU PLESSIS.

On the motion of Mr. Schreiner, provisional sentence was granted on a promissory note for £26 9s. 7d., payable at the Western Province Bank, Paarl.

BOARD OF EXECUTORS V. MALAN.

On the application of Mr. Molteno, provisional sentence was granted for £18, interest on a mortgage bond for £500, and for £6 7s., fire insurance premiums paid by plaintiff.

HIRST V. MULLER, SMIDT AND CO.

Mr. Molteno applied for discharge of the provisional order for sequestration, as the parties had arrived at a settlement.—Discharge granted.

UYS V. BAARTMAN.

Provisional sentence — Liquid document— Every document upon which provisional sentence is prayed must be stamped.

Mr. Juta moved for provisional sentence for £200 on a lease of property situated in the Transvaal.

Counsel directed the attention of the Court to the fact that the lease was not stamped, inasmuch as it had been executed in the Free State.

The Chief Justice observed that every liquid document upon which provisional sentence was prayed should be stamped. The necessary 5s. stamp having been affixed, the Court granted provisional sentence as prayed for.

THE UNION BANK, IN LIQUIDATION V. UYS.

Provisional sentence—Promissory Notes—Cession—Defence—Fraud.

Mr. Schreiner applied for provisional sentence on two promissory notes, one for £72 15s., and the other for £155, passed in favour of G. H. Moller and ceded by him to the Union Bank.

The defendant appeared to oppose provisional sentence and said that he did not owe the Union Bank anything. Defendant, however, admitted his signature on the notes, but said that Moller deceived him. He owed Moller £75, but the note for £155 had been filled in after he had signed it.

The Chief Justice, addressing the defendant, said that he had better go to the Attorney General, and lay his case before him.

Mr. Schreiner pointed out to the Court that the statement made by the defendant with regard to Moller had already been the subject of magisterial investigation, and that the record had been sent to the Attorney-General.

The Chief Justice: And was Moller not committed for trial?

Mr. Schreiner: That is my opinion, my lord.

The Chief Justice: If the defendant's statement is true I am surprised that Moller has not been committed for trial.

Mr. Graham said that, in justice to Mr. Moller, he might state that the charges made against Mr. Moller had been fully inquired into, and they included the present statement made by defendant.

The Chief Justice: That is no reason why he should not again go to the Attorney-General.

The Chief Justice then told the defendant that the Court could not assist him; he had signed the notes in favour of Moller, and on the strength of his signature the bank had advanced money, and was now entitled to judgment.

Provisional sentence was granted as prayed for.

S.A. LIFE ASSURANCE SOCIETY V. HARTINGH.

On the motion of Mr. Thorne, provisional sentence was granted on a mortgage bond for £1,300, less £300 paid on account, with interest on £1,000, less £10 paid on account; property declared executable.

S.A. LIFE ASSURANCE SOCIETY V. MULLER.

On the application of Mr. Thorne, provisional sentence was granted on a mortgage bond for £100; property declared executable.

SLUITER V. MALAN.

On the motion of Mr. Juta, provisional sentence was granted on £42 8s. 6d., money advanced.

STEYTLER V. COHEN.

On the application of Mr. Jones, provisional sentence was granted for £153 4s. 6d., balance of account.

VAN BELOW V. TIENGO—DUNCAN V. TIENGO.

Attachment — Postal drafts — Rule *nisi* operating as provisional attachment.

Mr. Schreiner presented the petitions of these applicants, and prayed that certain postal drafts recently purchased by the defendant, and supposed to be in possession of his wife, might be attached in satisfaction of certain claims which the applicants had against the defendant.

It appears that the defendant, who is an Italian, had until quite recently been a contractor on the railway. Some short time ago he realised all his effects, and came down to Cape Town under an assumed name, with the intention of leaving the Colony for Italy without having paid his debts.

The Court, after hearing counsel, granted a rule *nisi*, returnable on Wednesday next, calling upon the defendant to show cause why the postal drafts should not be attached by the Sheriff to abide the further order of the Court. The rule to operate as a provisional attachment.

LEVATTE V. LEVATTE.

Mr. McLachlan appeared for the plaintiff; the defendant in person.

This was an action for divorce instituted by Mr. John Levatte, of the Salt River Works, against his wife by reason of her adultery. The parties have been separated for the last two years.

Dr. J. Hewitt, examined by Mr. McLachlan, stated that he knew the defendant, and had attended her in her confinement about four weeks ago, when she was delivered of twins.

The plaintiff then entered the box, and detailed certain circumstances connected with his wife's infidelity.

The Court, after patiently listening to evidence of a very trying character, granted a decree of divorce, with custody of the two children of the marriage.

SUPREME COURT.

FRIDAY, MAY 22.

[Before the Chief Justice (Sir J. H. DE VILLIERS, Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

THE UNION BANK, IN LIQUIDATION V. UYS

Mr. Schreiner said that with regard to this matter, which was before the Court yesterday, he found that he had been in error in stating that Mr. Muller had not been committed for trial.

The Chief Justice: If that is so, there is no occasion to go to the Attorney-General, but it occurred to me yesterday that possibly Mr. Uys could produce further evidence. I did not for a moment assume that the Magistrate or the Attorney-General had acted improperly.

The Attorney-General remarked that the evidence taken at the preliminary examination had been laid before him, and after thoroughly sifting it and the facts elicited in cross-examination, he did not feel justified in proceeding further with the case. But if Mr. Uys could produce any further evidence it would receive his (the Attorney-General's) careful attention.

IN RE THE OMARURU G.M. COMPANY, LIMITED.

Winding-up Act—No. 12 of 1868—Application to be placed under operation of.

Mr. Juta, on behalf of the directors of the above-named company, moved for an order placing the company under the operation of the Winding-up Act.

It appeared from an affidavit, sworn to by Mr. L. J. Cauvin, that the company were indebted to Messrs. Anderson & Murison in the sum of £200, being the amount of a judgment, together with taxed costs on same, and if this amount were paid the other creditors of the company would be seriously prejudiced. Efforts had been made to effect a compromise with Messrs. Anderson & Murison, but they had failed. In consequence of this a resolution had been passed that the company should go into liquidation.

At this stage of the proceedings Mr. Webber moved, on behalf of Messrs. Anderson & Murison, for an order making absolute the rule *nisi* restraining the official liquidators of the Cape of Good Hope Bank from paying out to the Omaruru Gold-mining Company, or to any person other than the Sheriff, any dividend or funds awarded to the company, in order that such funds might be applied in satisfaction of a judgment obtained by the applicants.

The Chief Justice remarked that if the rule were made absolute that would not give the applicants priority after the company had gone into liquidation. No order would be made on the latter application, but on analogy to proceedings in insolvency the applicants would get their costs.

The Court granted the first application and appointed Mr. E. R Syfret official liquidator, at the same time conferring upon him the powers given by the 15th section of the Act. The liquidator to find security to the satisfaction of the Master in the sum of £500.

REGINA V. LOGAN.

Railway Restaurant licence—Act 44 of 1885, section 5—Contravention—Conviction—Appeal.

Sir Thomas Upington, Q.C., and Mr. Schreiner appeared for the appellant, Mr. J. D. Logan; and the Attorney-General (Mr. Innes, Q.C.) appeared for the Crown.

This was an appeal from a decision of the High Court at Kimberley, confirming a conviction of the appellant upon a charge of contravening section 5 of Act 44 of 1885, in that he did on Sunday, the 14th December, 1890, at Kimberley, sell liquor to one Wallis, a person to whom he was not by his licence authorised to sell. The record in the case having been read, and also the reasons of the learned judge in the Court below for his judgment,

Sir T. Upington said that it would be found that a good deal would turn upon the form of the licence which was issued to the appellant, and he would state that the licence was one which allowed the appellant to sell liquor in any quantity at the railway-station, on any day, within a reasonable

time before and after the arrival or departure of trains. It was a licence which differed in form from the ordinary licence issued to retailers under the Act of 1883, in which it was not specifically mentioned. After reading the Act, counsel went on to state that the licence was issued upon a certificate given by the Commissioner of Public Works, and that it was specially made out to allow the holder to sell to persons within a reasonable time, an hour before or after the arrival or departure of trains at the station. That was the difference between a licence of this sort and a licence issued in the ordinary manner. There was a distinction between the ordinary *bona-fide* traveller, who could obtain liquor at any time, and a person arriving at or departing from a railway-station, who could not be interfered with by any condition imposed by the Commissioner of Crown Lands or anyone else. He contended that the licence which granted permission to sell liquor within a reasonable time before or after the arrival or departure of trains, gave the holder the right to sell to any person within that period, not travellers only, but also their friends. To the traveller himself liquor could be supplied from morning until night, but he submitted that the persons accompanying him to the station could also be entertained within common-sense limits. With all respect to the learned Judge, it struck him that his lordship's argument was unsound, because had this been an ordinary retail licence, as his lordship regarded it, the holder could not have sold on Sunday at all, because ordinary Sunday privileges were abolished.

Mr. Schreiner followed on the same side, and quoted the case of "The Queen v. Dam" (8 Juta, p. 68). He contended that in the present licence there was absolutely no limitation as to persons, though there was limitation as to time. If the decision were upheld the Court must come to the conclusion that the appellant could sell to one class of persons on week-days but was debarred from selling to the same class on Sundays. He submitted that no case had been made out against the appellant.

The Chief Justice, without calling upon the Attorney-General, gave judgment. His lordship said that but for the provisions of the 79th section of Act 28 of 1883, there could have been no doubt that the appellant was not entitled, by virtue of his retail restaurant licence, to sell liquer at all on Sundays. The licence granted on the certificate of the Comissioner of Crown Lands must be read by the light of the Act which allowed its issue. They could not assume that the Commissioner intended giving to the licence-holder greater rights then the Act allowed him to do, or that the Distributor of Stamps intended to exceed his duties. Therefore, in his opinion, the words "on any day" meant any day allowed by the Act. From the licence itself it was quite clear that it was a retail licence. The permission to sell within a reasonable time before or after the arrival or departure of trains must be read by the lights of the previous sections of the Act, and in his opinion that portion of the sub-section which prevented the sale of liquor on Sundays was not intended to be repealed by the 17th section, and that being so the railway licence-holder would be justified in selling on Sunday. Coming to the 79th section, the second sub-section said that nothing should preclude the sale at any railway-station of liquor to persons arriving at, or departing from, such station by railway, and the effect of that provision was to authorise railway licence-holders to sell to persons actually travelling on Sundays. Whilst for the rest of the week they might sell to anyone within a reasonable time before or after the arrival or departure of trains, on Sundays they might only sell to persons actually travelling. That being so it was clear that the judgment was correct, but Mr. Schreiner had raised a technical point, and relied upon the case of "Dam and the Queen." He said that the appellant could not be proceeded against because he had not strictly broken the provisions of the section under which he was proceeded against. It appeared to him, however, that the present appellant was charged under the correct clause. He was charged with selling to a person to whom he was not authorised to sell by his licence, and, reading the licence by the light of the Act. he was only authorised to sell to persons actually travelling on Sundays. He sold to persons who were not travelling, and therefore he was properly charged. The appeal must be dismissed.

Their lordships concurred.

[Attorneys for the appellant Messrs. Scanlan & Syfret, for the Crown Messrs. Reid & Nephew.]

REHABILITATIONS.

On motions from the Bar, the rehabilitation of the following insolvents was granted: Benjamin Israel Nowitz, James Lamb, Marthinus Lambertus Vogelgezang, Marthinus Edward Johannes Bezuidenhoud, and Christian Loedolff.

GENERAL MOTIONS.

PETITION OF MICHAEL C. J. VAN RENSBURG AND OTHERS.

Mr. Joubert moved for authority to the Registrar of Deeds to correct certain errors in deeds of transfer relating to the farm Dassen Klip, situated in the division of Swellendam.

The Court granted a rule *nisi* (returnable on the last day of term) calling upon all persons interested to show cause why the errors specified in the petition should not be rectified by the Registrar of Deeds.

PETITION OF PHILIDA STOFFELS.

Mr. Graham, on behalf of the petitioner, applied for leave to sue *in forma pauperis* in an action about to be instituted by her against her husband for divorce by reason of his adultery.

Referred to counsel for his certificate.

PETITION OF ELIZABETH ATMORE.

Landed property settled by ante-nuptial contract—Sale—New investment.

On the motion of Mr. Molteno, authority was given to sell a certain piece of land known as Bloemfontein, situated in the district of Kokstad, settled upon the petitioner by ante-nuptial contract, in order to invest the proceeds in more convenient security.

THE CAPE OF GOOD HOPE BANK, (IN LIQUIDATION.)

Mr. Schreiner presented for the sanction of the Court certain compromises proposed to be effected by the official liquidators with shareholders and debtors of the bank.

Order granted.

SUPREME COURT.

WEDNESDAY, MAY 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN].

VON BELOW V. TIENGO.—DUNCAN V. TIENGO.

In this matter, which was before the Court on Thursday last, Mr. Schreiner, on behalf of the applicants, moved to make absolute the rule *nisi* calling upon the respondent to show cause why certain postal drafts, to the value of £800 and upwards, should not be attached pending the hearing of an action for debt about to be instituted against the respondent.

Sir T. Upington, Q.C., who appeared for Mrs. Tiengo, drew the attention of the Court to the fact that the documents which had been attached were not postal drafts but merely receipts, and remarked that unnecessary costs had been incurred by attaching worthless pieces of paper Counsel also commented upon the fact that, before the attachment, no application had been made to Mrs. Tiengo for the documents in question, and observed that had such an application been made considerable expense might have been prevented.

Mr. Schreiner contended that the documents which had been attached were the vouchers upon which payment would be made, and that they were the nearest approach to the postal drafts. Counsel further observed that unless a settlement were arrived at he might have to ask the Court to grant an order calling upon the Postmaster-General to stop payment in England or in Italy, in whichever country the drafts were made payable.

The Chief Justice, in giving judgment, remarked that the application was practically for an attachment *ad fundandam jurisdictionem*. In the absence of any explanation from the respondent the rule *nisi* would be made absolute. Costs to be costs in the cause.

SHAKOFSCO V. VAN NOORDEN

Pauper—125 Rule of Court—The Court refused to make absolute a *rule nisi* admitting an applicant to sue in *forma pauperis* where from the surrounding circumstances it appeared probable that the applicant had or could obtain funds sufficient to proceed with his action in the ordinary course.

Mr. Searle appeared for the applicant, and Mr. Juta for the respondent.

This was an application to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action about to be instituted by him for a declaration of rights in certain partnership matters between the parties.

Mr. Juta read an affidavit sworn to by the respondent, from which it appeared that the applicant was a cigarette-maker by trade, and that he could easily earn 10s. a day in Cape Town as there was a demand for this kind of skilled labour, and that under the circumstances the applicant ought to be able to proceed with his action in the ordinary way.

Mr. Searle having read an answering affidavit by applicant, contended that the test in cases of this kind was not what an applicant might be worth in the future, but was his present position such as to entitle him to ask the Court to be permitted to sue *in forma pauperis*. Counsel referred to the case of Behrens v. Berg (Buch. 1877, p. 188), and drew

the attention of the Court to the fact that Van Noorden in his affidavit had not denied the inability of the applicant to pay the costs of the case.

The Chief Justice, in giving judgment, remarked that under the 125th rule of Court provision was made for the bringing of actions by paupers upon notice been given to the opposite side. In cases of this kind it was, however, impossible to lay down any hard and fast rule; each case must be decided on its merits, and on the surrounding circumstances. In the present case he was not satisfied that the applicant was a pauper, and that he would not be able to find funds to bring his action. The rule would be discharged, but no order would be made as to costs.

Mr. Justice Smith remarked that actions of this kind, tending as they might to promote groundless litigation, ought not to be encouraged.

Mr. Justice Buchanan: In this case no injustice can be done by refusing the application.

WHEELER V. WHEELER.

On the motion of Mr. Molteno, the Court made absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action about to be instituted by him against his wife for malicious desertion and adultery.

ABRAHAMSE V. ABRAHAMSE.

On the application of Mr. McLachlan, the Court made absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action to be instituted by him against his wife for malicious desertion and adultery.

THE UNION BANK (IN LIQUIDATION) IN RE SIR T. SCANLEN'S COMPROMISE.

Mr. Schreiner presented for the sanction of the Court a certain compromise proposed to be effected by the official liquidators of the bank and Sir T. C. Scanlen. The compromise in question was an offer to pay 4s. in the £.

Mr. Juta, on behalf of some shareholders of the bank, opposed the application.

The Court refused to sanction the compromise, with costs.

THE D.R. CHURCH V. THE MASTER AND THE SOUTH AFRICAN ASSOCIATION.

Will — Mutual — Codicils — Construction — Creation of poor fund for benefit of needy relations—Administration—Special Case.

Mr. Schreiner appeared for the Consistory of the D.R. Church; Sir T. Upington, Q.C., and Mr. Giddy for the Master; and Mr. Juta for the S.A. Association.

This was a special case set down for the hearing of the Court, the plaintiffs being the Consistory of the D.R. Church, Cape Town, and the defendants, the Master of the Supreme Court and the South African Association. The main facts of the case are as follows: On the 18th March, 1794, Johannes Henock Neethling and his wife Anna Catherine Smuts, married in community of property, executed a mutual will by which each appointed the other and the issue of their marriage joint heirs of the first dying of them, the survivor being appointed the executor of the first dying. On the 17th April, 1886, the testators executed a codicil, by which they provided that the amount of certain debts due to them by their brothers and sisters respectively, and the children of such brothers and sisters in the first degree, should, after the death of both of them, constitute a poor fund for the benefit of their needy relatives in the degrees above mentioned, the revenues of which fund should be distributed by their executors with the advice of the Consistory or Kerkeraad, it being also provided by the said codicil that the further disposition of the capital and revenues of the said funds should be left to the said Johannes Henock Neethling, the executrix declaring herself satisfied with such provision as he should make in the premises. On the 21st April, 1886, the said J. H. Neethling executed an instrument by which, *inter alia*, he provided as follows with respect to the said fund: (*a*) That the amount of the aforesaid debts should constitute a poor fund for the families of Neethling and Smuts, from which fund the trustees thereof should have the power to grant pecuniary assistance to any of his or his wife's relations, being descendants of his or her father, and being deserving members of the said families, at the discretion of the trustees and executors, and after consultation by them with the Vestry or Consistory of the Dutch Reformed Church, Cape Town. (*b*) Provided for the rendering of yearly accounts to the Consistory. (*c*) That for the trouble of the examination and control of the accounts and fund, and for acting as arbitrators, with final power of division and judgment in case of doubt or question between applicants for relief, and trustees or executors, or the administrators of the said fund, a sum of 200 rix-dollars (or £15 sterling) should be paid annually to the said consistory for the benefit of their poor fund. (*d*) That the South African Association should be the executors and administrators of the said fund. On the 27th April, 1886, the testators jointly made a further codicil by which it was provided, *inter alia*: That so long as six joint heirs in the interest should survive, the heir in the capital should leave the capital under

the control of the testators' executors and administrators. That when the number of heirs should be reduced to six, the right of survivorship among them should cease, and the shares of the deceased should devolve upon the heir in the capital, and that one-half of what should come to him, over and above his share of inheritance in the interest, should be employed by him for the support of the most needy of the grandchildren of either of testators' parents bearing the name of Neethling or Smuts. That should the trustees, executors, or the heir differ in their calculations, the difference should be settled by arbitration or be submitted by motion to a judge. Lastly, that in case of difference the said Consistory or Kerkeraad should be arbitrators to settle such difference *de plano* without appeal, and should receive yearly for their trouble, for the benefit of their poor fund, the sum of 200 rix-dollars (£15), in the same manner as described in the instrument of the 21st April, 1836, on account of the testators' poor fund. The testator died in 1838 and his wife in 1850. The South African Association, after the death of the testatrix, became possessed of the fund constituted by the codicil of the 17th April, 1836, and by the instrument of the 21st April, 1836, and of the capital fund constituted by the codicil of the 27th April, 1836, and administered the same until 1872 as two separate and distinct funds, paying to the plaintiffs annually the sum of £15 in respect of each. In the year 1872 the South African Association paid both the funds into the Guardians' Fund, and since that time the Master has refused to recognise the right of the plaintiffs to more than one annual payment of £15, and has only paid them that sum yearly.

Mr. Schreiner, on behalf of the plaintiffs, contended that the codicil of the 17th April, 1836, and the instrument of the 21st April, 1836, and the codicil of the 27th April, 1836, created two separate funds, and that the plaintiffs were entitled to an annual payment of £15 in respect of each, besides arrears since the year 1872, when the funds were paid into the Guardians' Fund.

Mr. Juta, on behalf of the South African Association, submitted that the association should not have been made a party to the action, inasmuch as they had paid over the funds in question to the Master, and had nothing further to do with the matter.

Sir. T. Upington, for the Master, urged that the fund intended to be created by the codicil of the 17th April, 1836, and by the instrument of the 21st April, 1836, was merged in the fund created by the codicil of the 27th April, 1836, and that the plaintiffs were only entitled to one annual payment of £15 in respect thereof.

Cur adv vult.

Postea (May 28).

The Chief Justice asked Mr. Schreiner if he still contended that it was the duty of the South African Association to receive and administer the funds?

Mr. Schreiner said that he was quite willing to leave the matter in the hands of the Court.

Mr. Juta informed the Court that the first fund amounted to £8,925, and the second to £18,534, making a total of £17,459.

The Chief Justice delivered judgment. He said that they had found that two separate funds had been created by the instrument of the 21st April and by the codicil of the 27th April. These funds had been paid to the Consistory of the Dutch Reformed Church for a very considerable period, and the Court ought not now to disturb dispositions which had been so long in force. To the first of these funds, that constituted by the instrument of the 21st April, the plaintiffs were clearly entitled. As to the second fund, he was of opinion that the plaintiffs were only entitled to it when they had an opportunity of performing some duties in connection with it. He was informed that there were only at present five heirs, so that the duties of the Consistory would now begin, and for the future they would be entitled to the second annual payment of £15. The plaintiffs were not entitled to the arrears from 1872. Costs to come out of the estate, and to be paid out of the two funds in proportion to their respective amounts.

[Attorneys for the plaintiffs Messrs. van Zyl & Buissinne, for the Master Messrs. Reid & Nephew, for the S. A. Association Messrs. Wessels and Standen.]

SUPREME COURT.

THURSDAY, MAY 28.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

WATSON'S EXECUTORS V. BRODRICK.

On the motion of Mr. Graham, provisional sentence was granted on a mortgage bond for £200, with interest from 21st March, 1890; property declared executable.

HARRIS V. BEHM.

On the application of Mr. Webber, provisional sentence was granted on a mortgage bond for £250.

PRINCE, VINTCENT AND CO. V. LIZAMORE.

On the motion of Mr. Searle, the Court granted a final order for sequestration of defendant's estate.—The provisional order was granted on the 21st April last.

EXECUTORS ESTATE OF VINK V. UYS.

On the application of Mr. Maskew, this matter was ordered to stand over till Thursday next, as a settlement is likely to be arrived at.

VON BELOW V. TIENGO.—DUNCAN V. TIENGO.

In these two matters Mr. Schreiner moved for confirmation of the writ of arrest.

The defendant, who appeared in person, acknowledged both the debts, and judgment was given against him with costs.

ASSIGNEES ESTATE OF MCNAUGHTON V. LOUW.

On the motion of Mr. Webber, provisional sentence was granted on an acknowledgment of debt for £130.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: J. L. Erasmus, B. J. de Vaal, H. J. Adkins, F. P. J. van Zyl, and Gideon Beukes.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HERMINA M. OVERBEEK.

Maintenance—Application for funds in possession of Master by brother of person entitled—*Locus standi* of Applicant—Power of Attorney—Rule *nisi*.

Mr. Juta presented the petition of Mr. John Marquard praying for authority to draw towards the maintenance of the mother of the deceased a sum of money (£200) awarded by the executors to the parents. The petitioner was Mrs. Overbeek's brother, and the reason stated for the application not being in Mrs. Overbeek's name was the delicate state of that lady's health. It appeared from affidavit that Mr. Overbeek deserted his wife some years ago, and had not been heard of since 1885, when he was in Melbourne, but his present whereabouts was unknown.

The Chief Justice remarked that the present applicant had really no *locus standi*, and that a precedent of this kind could not be established.

Mr. Juta observed that any reference either to her husband or to business matters had the effect of greatly disturbing Mrs. Overbeek's mind, and under these circumstances it was considered prudent not to ask her to join in the application.

Mr. Justice Smith suggested Mr. Marquard's getting a power of attorney from his sister to act for her in the matter, and that the particulars need not be gone into in view of the state of her health.

The Court granted a rule *nisi* calling upon the husband to show cause, on the 1st August next, why one-half of the fund in question should not be paid to applicant for the purposes set forth in the petition, the Master to pay Mr. Marquard £50 on security being given, and on production of Mrs. Overbeek's power of attorney. Publication of the rule to be made once in the *Melbourne Argus*.

IN RE MARY ARTHUR.

Mr. Searle presented a petition from the Very Rev. the Dean of Cape Town, praying for the appointment of a *curator ad litem* in proceedings about to be instituted by the Committee of Management of St. George's Orphanage, to have Miss Arthur declared of unsound mind and incapable of looking after her person or property.

The Court after the production of a certificate from Dr. Falkiner, to the effect that Miss Arthur was of unsound mind and incapable of looking after her person and property, granted a rule *nisi*, returnable on Wednesday next, calling upon Miss Arthur to show cause why she should not be declared of unsound mind, a copy of the rule to be served personally on the alleged lunatic as well as on, Mr. Molteno whom the Court appointed *curator ad litem*.

IN THE ESTATE OF THE LATE SAMODIEN.

On the application of Mr. Graham, the Court granted a rule *nisi*, returnable on the last day of term, calling upon all persons interested to show cause why a certain mortgage bond, passed by the deceased in favour of one George Apsey, on 26th July, 1842, hypothecating a lot of ground on the Wynberg Flats, shall not be cancelled by the Registrar of Deeds.

MILLER V. THE RICHMOND LICENSING COURT.

In this matter Mr. Schreiner (for Sir T. Upington, Q.C.) applied for postponement for a week in consequence of certain answering affidavits having been sent down on paper not suitable for filing.

Mr. Searle, for the appellant, said he would not oppose the postponement if a promise were given that the matter should come on for hearing next week, as his clients were anxious that the case should be disposed of as soon as possible.

The matter was ordered to stand over until next week.

NEL AND OTHERS V. NEL'S EXECUTRIX.

Will—Mutual—Fiduciary and Fidei-commissary heirs—Prohibition to alienate—Construction—Special Case.

Mr. Juta appeared for the plaintiffs, and Mr. Searle for the defendant.

This was a special case, which came on for argument. The plaintiffs were the grandchildren of the late Gabriel Nel, and the defendant Francina Elizabeth Nel, in her capacity as executrix dative to the estate of the late Gabriel Nel. The late Mr. Gabriel Nel and his wife, to whom he was married in community of property, made a mutual will, dated 22nd May, 1869, by which, *inter alia*, they bequeathed their farm Strydpoort to their two sons, Gabriel and Andries Jacobus Petrus Nel (the fathers of the plaintiffs), which farm "was to become the property of their said children" after the death of the testators, under the express limitation, however, that the said heirs should not have the right to sell their respective shares in the said farm, or to alienate it in any other manner, but that the same should devolve upon and pass over to their children and their descendants as *fidei-commissary* inheritances. The testators died without having in any way revoked or altered the said will.

Mr. Juta contended that the farm Strydpoort devolved, upon the death of the testators, in equal shares upon the sons as fiduciary heirs, and that upon the death of, or voluntary surrender of his fiduciary interest in favour of his children by either of the said sons, his half-share devolved absolutely upon his children.

Mr. Searle, for the executrix, argued that the will imposed a *fidei commissum* in respect of the property, and that the same extended as far as, and included, the fourth generation reckoned from the plaintiffs; and that they were consequently not entitled to deal with the property in free and absolute ownership, but that the property upon their death ought to devolve upon their children, to be by such children held for and on behalf of their children and grandchildren according to the terms of the will. With regard to the *fidei commissum* extending to the fourth generation, where a perpetual entail had not been created, counsel referred to the following authorities: Voet (36, 1, 33), Van Leeuwen, *Censura Forensis* (Pars. 1, Lib. 3, cap. 7, Tit. 14), Sande (4, 5, 4), and Groenewegen, 159 Nov.

The Chief Justice, in giving judgment, remarked that at the outset he was rather disposed to favour the defendant's contention. Since, however, he had heard the entire argument, and had looked up the authorities, he was clearly of opinion that the plaintiffs ought to succeed. His Lordship read a passage from Grotius (2, 20, 11) bearing on the subject, and gave judgment for the plaintiffs, costs to come out of the estate.

Their lordships concurred.

[Attorneys for the plaintiffs Gus Trollip, for the defendant J. W. Sauer.]

BROWN AND BATE (IN HIS CAPACITY AS TRUSTEE) V. GREEN.

Insolvency—Ordinance 6 of 1843, sections 48 and 49—Leases—Act 19 of 1864—Cession—*Locus standi* of Insolvent—Exception—Amendment of Declaration.

Sir T. Upington, Q.C., appeared for the plaintiffs, and Mr. Schreiner for the defendant.

This case came on for argument on the following exception: "That the declaration discloses no cause of action, because on the sequestration of plaintiff's estate in 1884 all his rights vested in his trustee in insolvency." The facts of the case are as follows: The first-named plaintiff is a farmer residing at Lowestoffe, in the district of Cathcart, and the second-named plaintiff is the former's trustee in insolvency, the defendant being a general dealer residing in the division of Aliwal North. During the years 1871 and 1872 Brown became, and is still, lessee for twenty-one years, under the provisions of Act 19 of 1864, of the farms Ellerslie and Stratheyre, in the division of Cathcart. On the 25th May, 1882, Brown ceded and made over to the defendant all his right, title, and interest in the said leases as collateral security for the repayment of a debt due by him to the defendant, and the latter by a document dated 25th May, 1882, undertook to re-cede or re-transfer to him (Brown) the said leases, or to give him power to sell the same on his paying in full the amount of the debt with interest. In the year 1884 Brown surrendered his estate, and Bate was appointed, and is still, this trustee in insolvency. On the 12th December, 1886, a decree was made confirming the account and plan of distribution in the said estate. The declaration alleged that on the 19th June, 1885, the plaintiffs tendered, and offered to pay, to the defendant the amount of the said debt, with interest up to date, whereupon it became, and was, the duty of the defendant to re-cede and re-transfer the said leases to the plaintiff, or to his co-plaintiff, the trustee of his insolvent estate, for and on behalf of the creditors of the estate and the plaintiff. The defendant then claimed, and still claims, to retain the said leases for his own bene-

fit, to the damage of the creditors of the estate, who would be paid in full, and of the plaintiff, who would be entitled to a surplus after such payment in full in case the defendant had not violated his undertaking and agreement. The said leases are still in full force and effect, and form an asset in the said estate, and their force and validity are fully recognised by the Colonial Government, who are the lessors on behalf of the Crown, and who have not determined the same in favour of the defendant or otherwise, but have agreed to their continuance in full force in favour of those beneficially interested in them, including the plaintiffs, who have also fully recognised such force and validity. The plaintiff prays: (*a*) That the said defendant be adjudged to re-cede or re-transfer the said leases to the plaintiff or to his co-plaintiff, the said trustee, for the benefit of the creditors of the said insolvent estate and of the plaintiff, upon payment of the lawful amount of debt and interest as aforesaid, as the plaintiffs hereby tender to do. (*b*) That the said defendant be adjudged to pay the first-named plaintiff £1,000, as and for damages by reason of his refusal to re-cede or re-transfer the said leases as aforesaid. (*c*) That the plaintiffs may have such further or other relief as may seem meet, with costs of suit against the said defendant.

Mr. Schreiner, in support of the exception, contended that the first-named plaintiff (the insolvent) had no *locus standi*, as under the 48th section of Ordinance 6 of 1843 all insolvent's estate and rights vested in his trustee, except personal rights as provided for in section 49. Counsel, in his argument, referred to the following cases: "Pratt v. Pittman" (4 Juta, 189); "Du Plessis v. Du Plessis's Trustee" (5 Juta, 220); "Coetzee v. Wentzell" (4 Buch., E.D.C., p. 2).

Sir T. Upington submitted that both in the interests of the creditors of the estate and of his own the first-named plaintiff had a perfect right to join with his trustee as a plaintiff in the action. With regard to the second part of the prayer, he was prepared to substitute the name of the trustee for that of the first-named plaintiff.

The Chief Justice, in giving judgment, said that if the insolvent only had sued, the exception would have been upheld, but the trustee was the real plaintiff, and Brown was merely nominally joined as a plaintiff. The exception might have been disposed of at the hearing of the case. No order made on the exception. Declaration allowed to be amended by substituting the Trustee's name for that of first-named plaintiff in section (*b*) of prayer. Costs to be costs in the cause.

[Attorneys for plaintiffs Messrs. Fairbridge & Arderne, for defendant Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

FRIDAY, MAY 29.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. FREDERICKS AND MUHLER.

Mr. Justice Smith remarked that these two cases had come before him on review from a sentence passed upon the prisoners by the Assistant Resident Magistrate of Clanwilliam. The prisoners were charged with the crime of theft, and the cases had been remitted by the Attorney-General to the Magistrate, who passed a sentence of two years' imprisonment with hard labour on each of the prisoners. The sentence must be altered to that of one year's imprisonment with hard labour, as the Magistrate had no power to inflict a heavier punishment.

THE WORCESTER MUNICIPALITY V. THE COLONIAL GOVERNMENT.

Contract—Specific performance—"Remaining extent"—Construction.

Mr. Schreiner and Mr. Graham appeared for the plaintiffs, and Sir T. Upington, Q.C., and Mr. Giddy for the defendants.—This was an action for specific performance of a written contract alleged to have been entered into between the Colonial Government and the Worcester Municipality. The facts of the case are briefly these: The Colonial Government are the proprietors by purchase of the remaining extent of certain two farms Roodeval and Langerug, in the division of Worcester, on other portions of which the erven of the Municipality are laid out. In February, 1885, the Commissioners of the Municipality agreed with the Commissioner of Crown Lands and Public Works, as representing the Colonial Government, to buy the remaining extent of the farms above mentioned for £671 12s., and parliamentary sanction was obtained for such sale.

The defence set up by the Government was that the "remaining extent" did not include the Drostdy, or certain native locations and plantations situated on the said farms, and alleged that these buildings and portions of the farms were expressly excluded in the survey that had been made by Mr. Watson, and that the Commissioners had notice of such exclusion. The defendants also tendered the remaining portions of the farms, some 4,000 morgen in extent, with the exclusions above referred to.

Mr. Schreiner having read the correspondence, said that it disclosed all the terms of the contract, and that he did not think it necessary to call any witnesses.

The Court having expressed a wish to hear the plaintiffs' witnesses, Mr. Schreiner called Mr. Meiring (chairman of the Worcester Municipality), who stated that he had been a Commissioner on and off since 1854. He considered the contract as contained in the correspondence which had passed between the Commissioner of Crown Lands and the Municipality included the Drostdy, as well as the plantations and locations; if he had not thought so he would not have been a party to the sale, as the Municipality had full commonage right over the remainder of the farms, and no advantage could be gained by purchasing what they already had the use of. He valued the Drostdy at from £2,000 to £2,500. He knew that the Municipality were making a good bargain. He had no recollection of Watson's having told him that certain portions of the farms were to be excluded.

Cross-examined by Sir T. Upington: There was a fence around the Drostdy grounds, and enclosing the plantations. He did not remember Mr. Watson's having made any reference to the exclusion of these places from his survey. He was not aware that the Municipality held any titles.

Re-examined by Mr. Schreiner: The commonage which the Municipality was anxious to acquire was beyond the boundary of the farms in question.

In answer to the Chief Justice, witness stated that he did not think the Government knew that they were selling the Drostdy.

Mr. Frederick Lindenberg, an attorney-at-law and secretary to the Worcester Municipality, examined by Mr. Schreiner, gave particulars as to the calling of a meeting of ratepayers to consider the offer of the Government. In answer to the Court, witness said that the Drostdy was the residence of the Magistrate, and that the lower part of the building was used as Government offices. He had some doubts as to whether the latter building as well as the gaol had been included in the sale.

Mr. W. A. Nel corroborated the evidence of the last two witnesses.

Mr. T. K. Watson, a Government surveyor, stated that he had surveyed the farms in question, acting under instructions received from the Surveyor-General. He pointed out to the Commissioners appointed to inspect the beacons that a deviation would be made at the Drostdy so as to exclude that building as well as the gaol.

The examination of the Surveyor-General (Mr. Marquard) concluded the evidence for the defence.

Mr. Schreiner, addressing the Court, said that no matter how hard this case might appear to be, his clients stood upon their legal rights and were entitled to specific performance of the contract.

The defence set up by the Government was virtually *laesio enormis*, which had been abolished by statute, and in the absence of fraud, which had not been pleaded, the plaintiffs were entitled to have the contract construed as it stood, without the introduction of any matter which might modify or vary that contract. No injustice could be done or hardship occasioned, as it was merely a transferring of property from the central to the local Government.

The Court, without calling upon Sir T. Upington, delivered judgment.

The Chief Justice said that this was an action for specific performance of a contract of sale entered into between the Colonial Government, through the Commissioner of Crown Lands and Public Works, and the Worcester Municipality. The Government admitted that a contract was entered into to sell the remaining portions of the farms Roodeval and Langerug, and in fulfilment of that contract offered the plaintiffs a very considerable quantity of land, amounting to about 4,000 morgen. The Municipality, however, refused to accept this offer, because the Drostdy and certain native locations and plantations situated on the farms were excluded. If different issues had been raised in the pleadings he (the Chief Justice) would have had much to say on the matter, but as the case stood, they had simply to deal with matters of hard law. It was contended on behalf of the plaintiffs that as portions of the farms had been sold for £2,828 8s., and the property had cost the Government £3,500, they would be satisfied if they got the difference between these two amounts, namely, £671 12s. for the remaining portions. In proof of this, the letter of the 15th January, 1885, was relied upon. It was difficult to construe "remaining extent," but under all the circumstances of the case he (the Chief Justice) was of opinion that "remaining extent" meant the land remaining after the Government had selected those portions which were excluded. It was proved that the Drostdy had always been fenced off from the commonage, and had always been occupied by the Government, but if the contention of the plaintiffs was correct they were entitled, not only to the Drostdy, but also to the railway-station, as the latter formed part of the farm Roodeval. He merely mentioned this to show how absurd was the construction put upon the words, "remaining extent," by the plaintiffs. No doubt there might be circumstances under which these words might have a different meaning, but he (the Chief Justice) was satisfied that the true meaning put upon them was that contended for by the Government. He regretted the conduct of the Government in this matter, which was not

such as one would have expected from a person dealing with his private affairs. One would have thought that the Government would have been more careful in selling property belonging to the public. The judgment of the Court would be absolution from the instance with costs.

Mr. Justice Buchanan expressed his concurrence, and said that he quite agreed with the remarks which had fallen from the Chief Justice with regard to the action of the Government in the matter.

[Attorneys for the Worcester Municipality Messrs. Van Zyl & Buissinne, for the Colonial Government Messrs. Reid & Nephew.]

SUPREME COURT.

MONDAY, JUNE 1.

[Before the Chief Justice (Sir J. H. DE VILLIERS, Mr. Justice SMITH and Mr. Justice BUCHANAN.]

GROOM AND WHITE V. THE BECHUANALAND EXPLORATION COMPANY, LIMITED.

Mr. Searle and Mr. Shiel appeared for the plaintiffs, and Sir T. Upington, Q.C., and Mr. Schreiner for the defendant company.

This case (the particulars of which are fully set forth *ante* page 46,) came on for final hearing. On the 17th February last the plaintiff's evidence was heard, and the case postponed for the arrival in Cape Town of Mr. Harman, the company's agent in Bechuanaland.

Mr. F. E. Harman, superintendent of the company, and by profession a geological and mining expert, examined by Sir T. Upington, stated that he had lived in Khama's country a little over a year. He remembered the plaintiffs' arrival in Palapye and the subsequent delay in proceeding on their prospecting expedition, which was mainly due to Mr. White's illness. He advised plaintiffs to make for the Crocodile River, as being the only likely place in Khama's country in which they might find gold. They stopped, however, at a place about forty miles from Palapye, and he was obliged to order them away in accordance with instructions received from Khama. They then went about fifteen miles further on, near the Lotsani River, and he (witness) was again obliged to order them to desist from prospecting, as there were cattle posts in the neighbourhood, and Khama strongly objected to white men remaining near his people's kraals or cattle posts. A correspondence then ensued between plaintiffs and himself which led to nothing, and subsequently they (plaintiffs) returned to Palapye and sold all their effects. He saw no specimens of quartz with plaintiffs after their return. He had prospected all over Khama's country, and with the exception of the Crocodile River, he had found no indications of gold anywhere.

Cross-examined by Mr. Searle: He did not consider that plaintiffs had been guilty of a breach of faith in working where they did. He was of opinion that there was no gold where plaintiffs had been prospecting. The company had prospectors working on the Crocodile River, but they had not found much gold, and they had now gone to Mashonaland. In certain seasons of the year the Crocodile was unhealthy, but he did not know of any men having died of fever. One man, Mr. Tregenza, did die, but his death was due to an overdose of medicine.

Mr. Searle, on behalf of the plaintiffs, contended that the company had violated the terms of their contract, and that the plaintiffs were entitled to the very moderate damages which they had claimed.

The Chief Justice, without calling upon Sir T. Upington, recited the facts of the case, and after referring to the correspondence and agreement, held that there had been no breach—the judgment of the Court being absolution from the instance, with no order as to costs.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinne; Defendants' Attorneys, Fairbridge & Arderne.]

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

ASKEW V. MOLLER.

Insolvency—Ordinance 6 of 1843, section 19—Provisional order for sequestration—Petition unfounded, vexatious, or malicious—Principal and agent—Malice—Action for damages—Tender—Costs.

Sir T. Upington, Q.C., and Mr. Graham appeared for the plaintiff, and Mr. Schreiner for the defendant.

This was an action instituted by Mr. Thomas Arthur Askew, a produce and forage dealer of Claremont, against Mr. J. M. Moller, of Johannesburg, for £300, damages alleged to have been sustained under the following circumstances: On the 9th January last, the defendant, through his agent, Mr. H. P. Moller, petitioned the Court for the sequestration of plaintiff's estate. A provisional order was granted on the petition, and subsequently discharged on want of proof of insolvency.

The declaration alleged that under colour of the provisional order the defendant, through his agent, caused the plaintiff's business premises to be broken into and entered, and the stock, goods, and effects of the plaintiff to be attached and seized, and further caused the said premises to be closed, to the exclusion of the plaintiff. The declaration further alleged that the petition upon which the provisional order was granted was, within the terms of Ordinance 6 of 1843, section 19, unfounded, and vexatious or malicious, and that the acts of the defendant, through his agent, in procuring the said provisional order and in proceeding thereunder, were unlawful, and were unfounded and vexatious or malicious. The plaintiff further alleged that he had been injured by the aforesaid acts of the defendant in his business and credit, and that he had lost the profits and benefit of his business during the period that he had been excluded from the same, and that he had been damaged to the extent of £300.

The defence set up was that the provisional order had been obtained under a misapprehension that plaintiff was actually insolvent. Malice was denied, and an offer of £50 and costs up to date made, which latter was however declined.

Mr. T. A. Askew, the plaintiff, examined by Sir T. Upington, stated that the morning after the provisional order had been granted he found Mr. Moller, sen., and the Master's messenger in possession of his premises making an inventory of his stock, horses, carts, &c. He remonstrated with Mr. Moller, but the latter told him that he was going to look after No. 1. Even since the provisional order had been discharged, he had suffered considerable loss in his business and credit; and firms like Messrs. W. Searle & Son and Attwell & Co., which formerly had given him credit, now insisted upon cash transactions. Witness further stated that some of his best customers had left him, and that he estimated the loss he had sustained at about £244.

In cross-examination by Mr. Schreiner, witness said that he had been recently offered £1,200 for his premises by a Mr. Myburgh.

SUPREME COURT.

TUESDAY, JUNE 2.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

ASKEW V. MOLLER.

The further hearing of this case was resumed, the plaintiff being represented as before by Sir T. Upington, Q.C., and Mr. T. L. Graham, and the defendant by Mr. Schreiner.

The remaining witnesses for the plaintiff having been heard,

The Chief Justice asked whether, in cases of this kind, a principal could be held liable for the malicious acts of his agent? His lordship referred to the English law on the subject, and quoted the case of Limpus v. The London General Omnibus Company (11 W.R., 149, 7 L.T. & S., 245). In that case the driver of an omnibus, whilst plying between P. and K., wilfully, and contrary to express orders from his master, pulled across the road in order to obstruct the plaintiff's omnibus. In an action for negligence it was held that if the act of driving across to obstruct the plaintiff's omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was responsible; that his liability depended upon the conduct of the servant in the course of his employment, and that the orders given to him not to obstruct were immaterial. The Chief Justice read the remarks of Blackburn, J., to the following effect: "If the jury came to the conclusion that he (the driver) did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy—who may be supposed to be the rival omnibus—that would be out of the course of his employment. That saves all possible objections."

Mr. Schreiner, in reply to the Chief Justice, said that the matter had been referred to in the pleadings, and that malice had been specifically denied. As a matter of fact the defendant was in Johannesburg, and knew absolutely nothing about the insolvency proceedings. In any event, it was not for them to plead malice on the part of the agent.

The Chief Justice asked Sir T. Upington how it was that defendant's tender of £50 and taxed costs had not been accepted?

Sir T. Upington, addressing the Court, said that £50 would be very poor compensation indeed for the very serious injury which had been inflicted on plaintiff's business. Both creditors and customers had been in a great measure influenced by the insolvency proceedings, and he (counsel) submitted that this was a case in which the Court would grant substantial damages.

The Court, without hearing witnesses for the defence, delivered judgment. The Chief Justice said it was much to be regretted that the plaintiff had not accepted the very fair tender which had been made by the defendant. Under all the circumstances of the case, he (the Chief Justice) was of opinion that the tender was fair and reasonable, and was about the amount the Court would have

given by way of damages had no tender been made. In cases in which a reasonable tender had been made the invariable practice of the Court was not to give more than the amount of the tender, even where, if no tender had been made, they might possibly award a few pounds more. The actual damage which the plaintiff had sustained amounted to about £60, and under the circumstances £50 was a fair tender. Plaintiff's business was mainly a cash one, and the insolvency proceedings could not very materially affect him. It was true that in certain kinds of business (a banker's for instance), the mere fact of a sequestration order being granted might have the effect of ruining a man, but the present was not such a case, and he (the Chief Justice) was of opinion that the Court would not have awarded plaintiff more than £50 or £60. Under these circumstances, judgment would be given for the plaintiff for the amount of the tender, £50, with costs up to date of same. The costs subsequently incurred must, however, be paid by plaintiff.

[Plaintiff's Attorneys, H. P. du Preez; Defendant's Attorneys, Messrs. Wessels & Standen].

REGINA V. JAN PLESSIS, RACHAEL PLESSIS AND SUSAN FINNES.

The Chief Justice remarked that this case had come before him on review. The prisoners were charged with receiving sheep, knowing the same to have been stolen. There was no question as to the guilt of the male prisoner; with regard, however, to the female prisoners, the only evidence against them was the statement made by Plessis, and as this statement was made on the way to the Police-station, and not on oath, the sentence on the female prisoners must be quashed, that on the male prisoner would be confirmed.

COMBRINCK V. MYBURGH.

Negligence—Grass fire—Damages.

Mr. Juta and Mr. McLachlan appeared for the plaintiff; and Mr. Schreiner and Mr. Molteno for the defendant.

This was an action for £100 damages instituted by the plaintiff, who is the occupier of a farm called Oude Kraal in the Cape Division, against the defendant, a farmer living at Hout's Bay. The declaration alleged that on the 4th February last the defendant kindled, or caused to be kindled, on his farm a fire, and negligently allowed the said fire to spread and extend beyond the boundaries of his farm down the sides of the mountains known as the Twelve Apostles, and on to and over plaintiff's farm Oude Kraal, and thereby damaged the plaintiff to the amount of £100, by reason of the destruction of timber and pasturage. The defendant in his plea admitted that he kindled a fire on his farm on the 4th February, but alleged that another fire, and not the one that he had kindled, had done the damage complained of. Defendant further pleaded contributory negligence on the part of the plaintiff, in allowing the fire to spread and extend over his (plaintiff's) farm. Upon these facts issue was joined.

Jacob Troutman, a fisherman residing at Hout's Bay, examined by Mr. Juta, stated that he remembered the fire on Wednesday, the 4th February. He went into Wynberg in the morning, and saw the fire on Myburgh's farm. The fire was extending towards Oude Kraal. Witness did not go out to fish next morning, as there was a strong south-east wind blowing. He saw no other fires on the mountain on Thursday.

Mr. De Vries, a sodawater manufacturer, of Cape Town, stated that he knew Oude Kraal well, and was there during the fire. He and several others watched the fire, which spread over the farm very quickly owing to the strong south-east wind which was blowing at the time. Witness also stated that he saw the pasturage and timber being consumed.

The plaintiff and a great number of other witnesses were called, who were unanimous in their opinion that the fire extended from Myburgh's farm over to Oude Kraal.

Mr. Molteno, a Government surveyor, examined by Mr. Schreiner, stated that he had visited the scene of the fire, and had made a plan (produced) of the parts of the mountain which had been burnt. Witness was inclined to think that there had been two fires, but where the second had proceeded from he could not say.

The further hearing of the case was postponed until Friday next.

SUPREME COURT.

WEDNESDAY, JUNE 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

IN RE MARY ARTHUR.

De lunatico inquirendo—Act 20 of 1879—Illegal removal and detention of alleged lunatic—*Locus standi* of plaintiffs.

Mr. Searle appeared for the Dean of Cape Town (in his capacity as chairman of the Committee of

Management of St. George's Orphanage); the defendant being represented by Mr. Molteno, her *curator ad litem*.

This was an application to make absolute the rule *nisi* granted on Thursday, the 28th May, calling upon the defendant to show cause why she should not be declared of unsound mind and incapable of looking after her person and property.

Mr. Molteno raised a preliminary objection as to the *locus standi* of the plaintiffs, and submitted that relatives only could come to the Court with an application of this kind.

The Court ruled that as some at least of the Committee of Management were joint trustees with Miss Arthur of the property and funds of the Orphanage, they were entitled to ask for the appointment of a *curator bonis*.

Mr. Searle having read extracts from the trust deed under which the Orphanage was constituted, called

Dr. Thomas Falkiner, who stated that he had known Miss Arthur for some years. On the 21st of May last he saw Miss Arthur at the Orphanage. When he entered her room he found her sitting on a bed made on the floor, surrounded by a number of toilet and other requisites. Miss Arthur would not enter into a conversation with witness, but made several incoherent observations in the form of a song or chant. She had a bell near her bed which she rang at intervals. She was suffering from what she described as the "chokes," and as a remedy drank considerable quantities of water. Subsequently on the same day (May 21) he received two letters from Miss Arthur asking him to visit her, but he did not do so. Some three or four years ago he had seen Miss Arthur in a similar condition, and he was clearly of opinion that she was of unsound mind, and incapable of managing the Orphanage or of taking care of her person or property. He was one of the doctors who had signed the certificate.

Cross-examined by Mr. Molteno: Miss Arthur did not send for him. On the 21st May he received two letters, one from Archdeacon Lightfoot and the other from a local firm of solicitors, asking him to visit her. On the former occasion to which he had referred he had declined to sign a certificate, because he did not want to have anything to do with Miss Arthur's case.

In answer to the Chief Justice, witness stated that he could best describe Miss Arthur's symptoms as being those of "recurrent mania."

Dr. W. C. Scholtz, Miss Arthur's regular attendant, and who also signed the certificate for her removal, corroborated in most of the details the evidence of the previous witness.

By the Court: He had signed the certificate under protest, but he had no doubt as to Miss Arthur's insanity. He would have signed the certificate if Miss Arthur had been a private individual with friends to look after her.

Dr. Dodds, superintendent of the Valkenberg Asylum, said that Miss Arthur was admitted into the institution on the 23rd May. At times she was perfectly rational and evinced considerable mental activity, but at other times she suffered from great mental excitement. When she was suffering from the "chokes" she was very irritable, the slightest sound annoyed her, and she made a peculiar noise more resembling the bark of a dog than anything else. Water appeared to be the only thing that caused her relief, and of this she drank large quantities. She interested herself in the management of the asylum, and offered many excellent suggestions which he (witness) wished he could carry out. Generally, he was of opinion that Miss Arthur's mental condition was such that she ought not to be entrusted any longer with the management of the Orphanage, and that she was not capable of looking after her person and property.

Dr. C. F. Murray stated that he had examined the defendant some three or four years ago, and had signed the certificate for her removal to the Old Somerset Hospital. The symptoms she then exhibited were very similar to those which had been described by the previous witnesses.

Miss Harriet Smith and Miss A. L. Howard having given evidence as to the eccentric manner in which Miss Arthur managed the Orphanage during her attacks of the "chokes."

Mr. Molteno called Mr. Arderne, who stated that he had been Miss Arthur's attorney for the last 25 years. He had never seen defendant when she was suffering from the attacks described by the medical witnesses. Whenever he had had interviews with Miss Arthur he never noticed anything which would lead him to suppose that she was of unsound mind, and during the hearing of the present case she had suggested questions as pertinent as any client he had ever had. He was quite willing to act as *curator bonis* if the Court appointed him.

The Chief Justice asked defendant whether she would like to make her statement in open court or before judges in chambers.

Miss Arthur, through her counsel, expressed her strong desire to be examined in open court.

After the adjournment the defendant, being duly sworn, stated that from infancy she had suffered from a weak heart and from nervous attacks; when these attacks were bad they produced a choking sensation, and were what she called the "chokes." None of the doctors understood her complaint exactly, but she was at present writing a book on the "nerves," and when this work appeared the nature of her malady, which was not insanity, would be explained. She was quite prepared to give up the management of the

Orphanage in favour of Miss Smith, but she declined to relinquish control of the funds.

Mr. Molteno said that before the Court expressed an opinion on the case, he wished to question the legality of Miss Arthur's removal to and detention in the Valkenberg Asylum.

Counsel referred their lordships to Act 20 of 1879, and contended that inasmuch as defendant was not a dangerous lunatic within the terms of the Act, the doctors and Magistrate were not justified in signing the certificate upon which she has been removed to the asylum

The Chief Justice, in giving judgment, said that he entertained no doubt whatever but that at times Miss Arthur was of unsound mind, and during these periods was incapable of looking after her person and property. He quite agreed with Mr. Molteno that the defendant's removal and detention in the asylum were illegal, the terms of the Act had not been complied with, there was no proof that Miss Arthur was a dangerous lunatic, and were it not that she had expressed a wish to return to the Valkenberg Asylum he (the Chief Justice) would have ordered her immediate release. After hearing evidence and Miss Arthur's statement, the Court were of opinion that defendant was of unsound mind and incapable of looking after her person and property. Dr. Dodds would be appointed curator of her person, and Mr. Arderne of her property, but the defendant would have leave to apply at any time to have her curators removed upon showing sufficient cause.

TEENGS V. GARLICK.

Bill of Exchange—Interdict—Attachment.

Mr. Schreiner appeared for the plaintiff, and Mr. Searle and Mr. Watermeyer for the defendant.

This was an action to recover £112 on a bill of exchange drawn by Messrs. Johnson & Co., of Klerksdorp, or the defendant in favour of the plaintiff. The defendant refused to accept the bill on presentation, or to honour it when it became due on the 3rd November last. On the 7th November the plaintiff obtained an interdict restraining the defendant from paying to any one except the Sheriff £112 out of certain funds at that time alleged to be in possession of the defendant, but belonging to Johnson & Co. The £112 has since that date remained in possession of the Sheriff, and the plaintiff now asked for a declaration of rights, and that the money in question should be paid to him in satisfaction of a judgment, for which he prayed the Court. It appeared that previous to the granting of the interdict above referred to, an interdict had already been put upon the funds in defendant's possession, in the matter of Levin v. Garlick. (C.T.L.R., p. 25.)

The evidence of Mr. Johnson having been heard, the Court held that when the second interdict was granted, there were no funds capable of being attached, and without hearing further evidence, gave absolution from the instance with costs, including the costs of the interdict.

[Plaintiff's Attorneys C. C. de Villiers. Defendant's Attorneys Messrs. Van Zyl and Buissinne.]

SUPREME COURT.

THURSDAY, JUNE 4.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

PROVISIONAL ROLL.

AURET V. THE EXECUTOR OF HAARHOFF.

Ordinance No. 104, section 33—Administration accounts—Non-compliance with terms of statute—Costs *de bonis propriis*.

Mr. Graham appeared for the plaintiff, and Mr. Juta for the defendant.

This was an application under Ordinance No. 104, section 33, calling upon the defendant to file his administration account and pay, *de bonis propriis*, the costs of the present application. It appeared from affidavit that the defendant entered upon his duties on the 7th March, 1890, and up to the present no account had been filed. An affidavit was read from the defendant in which he stated that at present he was detained in Pretoria on important business, but on his return to Kimberley, a month or two hence, he would be quite prepared to furnish the required accounts, and pay plaintiff's claim if the estate was solvent.

The Chief Justice, in giving judgment, said that no sufficient cause had been shown by the defendant as to why he had not filed his accounts. The Ordinance required that this should be done within six months. The defendant would be ordered to file his accounts within three months and to pay, *de bonis propriis*, the costs of the present application.

EATON, ROBERTSON AND CO. V. OLIVER.

On the application of Mr. Watermeyer, the final adjudication of the defendant's estate was ordered. The provisional order was granted on the 27th May.

STEPHAN V. LIPSETT AND WIFE.

Promissory Note—Provisional sentence—Arrangement entered into between maker and payee—Holder in due course—Notice.

Mr. Juta appeared for plaintiff, and Mr. Searle for the defendants.

This was an application for provisional sentence on a promissory note for £261 18s. 8d., given under the following circumstances. It appears that T. R. Lipsett, the defendant, and his brother, William Lipsett, had been in partnership as general drapers in Cape Town. William Lipsett's wife advanced to the business the sum of £450, and part of this amount was repaid by the firm, the balance being the sum now sued on. William Lipsett took a promissory note from T. R. Lipsett and his wife for the balance, namely, £261 18s. 8d., on the understanding (as it was alleged) that the note was not to be put in suit until T. R. Lipsett was in a position to meet it, although interest was to run from the 1st March of this year. Subsequently W. Lipsett indorsed over the note to his wife's trustee under her ante-nuptial contract, and the trustee, the present plaintiff, now sued on it.

Mr Searle contended that this was not a case for provisional sentence. The note had been given under special conditions, one of which was that payment was not to be demanded until the first-named defendant was in a position to pay. Counsel further contended that inasmuch as Wm. Lipsett could not sue on the note the present plaintiff (who was in reality William Lipsett's wife) could be in no better position.

The Chief Justice said that if William Lipsett had sued on the note the Court might have refused provisional sentence. There was no evidence, however, that either Mr. Stephan or William Lipsett's wife was aware of the arrangement which had been made by the brothers. Under these circumstances, provisional sentence would be granted with costs.

CARELSE V CARELSE.

On the application of Sir T. Upington, Q.C., judgment was granted in terms of consent.

REHABILITATIONS.

On motion from the Bar the rehabilitation of the following insolvents was granted: Walter John Currie (deceased), release from sequestration; Alfred Benjamin Kidwell and Jacob Johannes Rossouw.

GENERAL MOTIONS.

RENSBURG V. PRINS AND OTHERS.

On the motion of Mr. Searle, the Court made absolute the rule *nisi* interdicting the respondents from molesting applicant, and from trespassing on his property, situated in the district of Oudtshoorn and known as part of the farm Matjes River, pending the result of an action to compel transfer of the land in question.

DE KLERK V. MARAIS.

Divisional Council election—Ordinance 40 of 1889, sections 18 and 269—Rates—Right of voting—Owner and occupier.

Sir T. Upington, Q.C., appeared for the applicant, and Mr. Juta for the respondent.

This was an application for an order setting aside the decision of the Court of Investigation in regard to the Divisional Council election for Tulbagh, and declaring that applicant was elected a member for the said Council for Ward No. 1.

Sir T. Upington said that the first point the Court had to decide in this matter was whether, under Act 40 of 1889, occupiers of land who had not paid their rates were disqualified from voting. Counsel referred to several sections of the Act, and contended that it could not have been the intention of the Legislature to deprive occupiers of land of their right of voting merely because the owner, upon whom the primary duty devolved, had not paid the rates.

The Court, after hearing Mr. Juta, delivered judgment.

The Chief Justice said that section 18, sub-section (*a*), clearly indicated the persons who were not entitled to vote, and section 269 empowered every Council in suing for the recovery of rates to proceed against the owner or lessee, or occupier, either separately or both of them in one and the same action, each for the whole rate, in any competent court. He was of opinion that when a person can be sued without notice for a certain amount, that amount is due. It did not follow that because the owner was primarily liable the occupier was not legally liable. The case of a principal and surety who had renounced the *beneficia* was analegous. As the case was to be decided on the point submitted, he was of opinion that the application should be refused with costs.

Mr. Justice Smith referred to several sections of the Act, and said that he was inclined to think that the duty of paying the rates was on the owner of the property. He would draw a distinction between this case and that of a principal and surety.

Mr. Justice Buchanan said that at first he had some difficulty in arriving at a decision. After, however, having carefully considered the sections referred to, he agreed with the construction put upon them by the Chief Justice.

Application refused with costs.

EXECUTORS MARY QUIN V. EXECUTORS JOHN QUIN.

Mr. Schreiner moved for the issue of a commission to take the evidence, *de bene esse*, of the defendant at Johannesburg, South African Republic.

Sir T. Upington, Q.C., opposed the motion, and said that it was very desirable that the defendant should be examined in court, as questions of account would be raised involving a sum of £3,400.

The Court ordered the defendant to be present at the trial, which was set down specially for Tuesday, 7th July; costs to be costs in the cause.

LAWRANCE V. WARD AND WESSELS.—CORONEL V. WARD AND WESSELS.

Practice—Pleadings—Bar—Claim in reconvention — Security for costs—*Judicatum solvi.*

As the facts in these two matters were similar they were heard together. Mr. Juta, on behalf of the first-named defendant, moved for an order removing the notice of bar filed by the plaintiffs against the defendant Ward, and requiring them to furnish security to the said defendant for his claim in reconvention.

Sir T. Upington, Q.C., and Mr. Graham appeared for the plaintiffs.

It appeared that the defendant Ward was barred from pleading on the 29th of May last.

Mr. Juta read an affidavit sworn to by Mr. G. M. Findlay, of the firm of Findlay & Tait, solicitors, explaining why the pleadings had not been filed. The affidavit in question stated that Messrs. Findlay & Tait had special instructions from their client Ward not to incur any expense until adequate security had been given for defendants' costs (the plaintiffs not being domiciled in the Colony), and that they had acted on those instructions. That security for costs was only given and accepted on 27th May, and that he (Mr. Findlay) contended that Ward was entitled to eight days from that date within which to file his plea. That on 3rd June he tendered the defendants' plea to the Assistant Registrar, when it was declined, notice barring defendant from pleading having been filed. That the defendant Ward claims in reconvention the sum of £175,000, and that he has no security for any amount which he might recover in reconvention, the plaintiff having no assets within the jurisdiction.—To this an answering affidavit from Sir T. Scanlen was read by Mr. Graham.

Sir T. Upington, in opposing the application, contended that the defendants had no right to lie by until security had been given, and that it was their duty to have demanded security. Counsel characterised the action of the defendants as an attempt to postpone the case till next term well knowing that his clients' right of purchase must be exercised before the 30th June. Personally, he had no objection to the bar being removed, on the understanding that the case was set down for trial this term.

Mr. Juta, on the authority of "Taylor & Symonds v. Schunke" (C.T.L.R., p. 14), contended that his clients were entitled to security for their claim in reconvention.

After further argument, the Court granted an order removing the bar, made no order as to security for the claim in reconvention, and fixed Tuesday, 23rd June, for the trial; costs to abide the result.

SUPREME COURT.

FRIDAY, JUNE 5.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

IN RE SCHEEPERS.

On the motion of Mr. Schreiner, Mr. Jacobus Johannes Scheepers was admitted to practise as an attorney of the Supreme Court, the oaths to be taken before the Resident Magistrate of Burgher-dorp.

IN THE INSOLVENT ESTATE OF ROBERT OLIVER.

On the application of Mr. Watermeyer, Mr. William Arthur Eaton was appointed provisional trustee in the above estate.

IN RE THE KNYSNA CONSOLIDATED GOLD-MINING COMPANY, LIMITED.

Winding-up Act—No. 12 of 1868—Application to be placed under operation of.

Mr. Juta presented a petition from crediters of the above company for an order placing the company under the operation of the Winding-up Act

of 1968, and suggesting Mr. Charles W. Thesen as a fit and proper person to be appointed official liquidator.

Mr. Schreiner presented a similar petition from three miners who had been brought out from England, and whose claims against the company amounted to over £400; the petition further prayed that Mr. G. W. Steytler, of Knysna, should be appointed co-liquidator with Mr. Thesen.

The Chief Justice read a letter from the English liquidater asking that extreme measures should not be taken, as there was a possibility of refloating the company if time were given.

The Court, after hearing counsel as to the relative merits of Mr. Thesen and Mr. Steytler for the office of liquidater, made an order placing the company under the operation of the Winding-up Act, appointed Mr. Thesen official liquidator, and conferred upon him the powers given under the 15th section of the Act. Security to be found to the satisfaction of the Master in the sum of £2,000.

BENALLY V. BENALLY.

Mr. Searle appeared for the plaintiff; the defendant in person. This was an action for divorce instituted by the plaintiff, Jerome Benally (a French Creole), against his wife, Elizabeth Benally, by reason of her adultery.

Proof of the marriage having been given,

Castina Meyer entered the box, and stated that on the 30th March last she was at plaintiff's house, when a coloured man named Louis called to see Mrs. Benally. She was subsequently sent for a bottle of wine, and on her return she learned from plaintiff's nephew that defendant and the man Louis were in the bedroom together. She (witness) afterwards saw them in that apartment under circumstances which she detailed to the Court.

In answer to the Chief Justice, witness said that she only told plaintiff about this matter when he had accused her of stealing his ring.

The evidence of last witness was corroborated by the nephew of the parties.

The defendant then addressed the Court, protested her innocence, and stated that her husband had induced the witnesses to give the evidence which their lordships had heard.

Finally the Court granted a decree of divorce, and gave the plaintiff the custody of the child, the only issue of the marriage.

[Plaintiff's Attorney D. Tennant, jun.]

COMBRINCK V. MYBURGH.

Mr. Juta and Mr. McLachlan appeared for the plaintiff, and Mr. Schreiner and Mr. Molteno for the defendant.

The further hearing of this case, which was partly disposed of on Tuesday last, was resumed.

Mr. Van Oudtshoorn, examined by Mr. Schreiner, stated that he was a road superintendent in the employment of the Divisional Council. He lived on defendant's property, and on the morning of the 4th February he was working in a quarry about 100 yards from Mr. Myburgh's house. He saw smoke on the mountain before the fire on Myburgh's farm had been kindled. The smoke appeared to be to the right of Kasteel's Kop. The fire on defendant's farm was lighted about ten a.m. The fire did not burn very quickly in the morning, but in the afternoon the wind was very violent, and the fire spread rapidly up the mountain. The fire extended to the left of Kasteel's Kop. In the evening he could not see the fire on Kasteel's Kop, but he saw the reflection in the sky. He was sure that was not Myburgh's fire.

Cross-examined by Mr. Juta: The wind was not strong on the morning of the 4th February. He could not say whether fishing-boats could go out that morning. He (witness) would not have gone; he was not fond of the sea. He could see the mountain and Kasteel's Kop from where he was standing. He was sure he saw smoke on the mountain on the morning of February 4 before the fire was lighted on Myburgh's farm.

Several other witnesses for the defendant were examined, and they all positively asserted that there was a fire on the mountain before the fire on Myburgh's farm was lighted.

After argument,

The Court (the Chief Justice dissenting) gave judgment for the plaintiff in the sum of £50 and costs.

The Chief Justice, in dissenting from his brother judges, made the following observations in the course of his judgment: The questions to be decided in this case were purely questions of fact, and these facts would no doubt strike different minds in a different manner. The plaintiff had to prove clearly that his neighbour had occasioned the fire from which he had suffered damage. A person who in the circumstances of this case would be criminally liable would certainly be civilly liable to his neighbour, but if the defendant were on his trial, he doubted very much if a jury would find him guilty; he (the Chief Justice) could not honestly and conscientiously convict him. Unless the evidence of the defendant's witnesses was to be wholly disbelieved, there were two fires burning on the mountain on the 4th February, and it was just possible that the fire from Kasteel's Kop reached plaintiff's farm before the fire from Myburgh's. Under such circumstances, he was of opinion that the defendant ought to have the benefit of the doubt; as his brother judges had, however, taken a different view of the case, judgment would be given for the plaintiff.

[Plaintiff's Attorney H. P. du Preez, Defendant's Attorney C. C. de Villiers.]

SUPREME COURT.

MONDAY, JUNE 8.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

LIQUIDATORS PAARL BANK V. EXECUTRIX AND HEIRS OF G. J ROUX.

Company — Bank in liquidation - - Contributories —Executrix —Heirs—Liquidators —*Locus standi*—Amendment of declaration—Prescription—Costs.

Sir T. Upington, Q.C., M.L.A., and Mr. Schreiner appeared for the plaintiffs, the liquidators of the Paarl Bank, and Mr. Juta and Mr. Castens for the defendants, the heirs of the late Gerhardus Johannes Roux.

In this case counsel stated that the first defendant was the widow and executrix of the late G. J. Roux, and the second defendants the children of the first defendant and her deceased husband, the widow being sued in her capacity as heir. The late G. J. Roux was the registered owner of eleven shares in the Paarl Bank, and by his will he bequeathed them to the defendants. He had been married in community of property, and the widow had the right to dispose of the shares if she had chosen. On the 26th June, 1876, the first defendant filed an account of liquidation and administration in the estate, and in that account the shares were set down as an asset for £55. The first defendant was awarded the sum of £1,008 as executrix and £331 0s. 6d. as heir, and the other two defendants were awarded £331 0s. 6d. as heirs. The estate had been placed on the list of contributories to the bank by an order of the Supreme Court. It was stated by the defendants that there were no assets with which to meet the bank calls, and the first defendant said that she had distributed the money in the estate to the heirs. The plaintiffs demanded payment of the calls or a refund out of the estate, or that the said sums which were awarded the heirs should be set off as a part discharge of the bank calls. The first defendant was in default, and the other two heirs took exception to the declaration.

Mr. Juta took exception to the declaration, and contended that the liquidators had no right to sue and were not the persons to come into court. The executrix was the person who must sue, and the heirs must be sued. If money were to be recovered the executrix must sue, and if the executrix did not do her duty the Court could be moved by any creditor to remove the executrix or compel her to do her duty, as in the case of a negligent trustee in an insolvent estate.

The Chief Justice said that under the English law the creditor could sue, as in this case. The consistent course was for the executor to sue, but there might be a double liability, and the heirs might be sued under certain circumstances. This lady did not sue herself and she would not sue herself. Did that amount to misconduct which would entitle creditors to have her removed?

Mr. Juta replied that it did, in his judgment.

Sir T. Upington argued that on the authority of the case of Fischer v. The Liquidators of the Union Bank (8 Juta, 46), the Court gave power to a creditor to sue, as in the present case. Counsel also referred to Hofmeyr's case (C.T.L.R., 64).

Mr. Juta submitted that if the plaintiffs in this case were allowed to succeed there would be no finality whatever. It was clear that only the executor could sue.

The Chief Justice: But suppose the executor does not sue?

Mr. Juta: That is not proved in this case, my lord.

The Chief Justice: It is quite clear that Mrs. Roux will not sue herself and her children.

Mr. Juta: She can be compelled by process of Court.

After argument,

The Chief Justice said that in this case there was virtually a judgment against the executrix of the estate. A call had been confirmed by the Court, and that really amounted to a judgment against her. From the declaration it appeared that the call had not been met, there having been a return of *nulla bona*, but the executrix said she had paid out the money to herself as surviving spouse, and to her children as heirs. The question was whether she was entitled to recover the money back from the heirs, or not. If she were entitled to recover, did she do her duty? It was clear she did not intend to do her duty, and it did not appear likely that she would sue herself and her children for this money. The liquidators said they did not wish to proceed to take extreme steps and have her removed from her trust, because they could not say there had been such misconduct on her part as to justify that extreme course. They, therefore, now sued as creditors of the estate for sums of money paid to persons not entitled to them. It being clear that the defendant would not sue herself and her children, the plaintiffs were, under the circumstances, entitled to sue. It appeared further that there were other creditors, among others the Union Bank, and inasmuch as there were other creditors, he thought it would be right that any moneys paid to Mrs. Roux should be paid to her in her capacity as executrix, so that she might administer the whole funds. Under those circumstances the Court thought it better that in the heading of the action there

should be placed after the word Roux, "in her individual capacity as well as her capacity as executrix of the late G. J. Roux." If this amendment were made there would be no objection to the declaration.

Evidence was then led.

Gerhardus Johannes Roux, one of the defendants, examined by Mr. Juta, said that all the heirs agreed to value the shares at £55 in the administration accounts. The dividends on the shares had always been received and kept by his mother-in-law (Mrs. Roux), and the bank knew that the moneys in the estate were paid out to the heirs.

By Mr. Schreiner: He did not act for Mrs. Roux in the distribution of the moneys in the estate, but her son assisted her.

Mr. Juta put in a statement to the effect that the Paarl Bank was perfectly solvent when the estate was administered, and for years after, and said that Mrs. Roux paid out £850 of this money in November last as a compromise to the Union Bank.

Mr. J. I. de Villiers, M.L.A., one of the liquidators of the Paarl Bank, examined by Sir T. Upington, said that with reference to an allegation that the directors of the bank unlawfully refused to register the shares in suit when desired by the first defendant, a careful search of the bank books failed to show a record of any such occurrence.

By Mr. Juta: He knew who were the directors of the bank from 1876 onwards. Most of them were still alive.

After argument,

The Chief Justice said that the Court had already decided on the exception that the plaintiffs were entitled to sue the heirs if the executrix would have been entitled to do so, as she clearly would have been by the *condictio indebiti*. Such being the case, they had next to consider when the executrix's cause of action arose. In his (the Chief Justice's) opinion, her cause of action arose as soon as the money had been paid to the heirs, when she would have been entitled to have demanded repayment. If this view were correct, then the plaintiffs were barred by prescription from proceeding against the heirs, and their only remedy was against the first-named defendant in her individual capacity. Judgment would therefore be for the plaintiffs against the first defendant for £1,337 9s. 5d. with costs against her in her individual capacity, the costs of the two last-mentioned defendants to be paid out of the estate, failing such payment by the first defendant individually, and failing her by plaintiffs.

[Plaintiff's Attorney C. C. de Villiers, Defendants' Attorney J. C. Berrangé.]

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CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. FORDE AND CO.

Promissory Note—Fixed Deposit Receipts—Compensation—Cession of action—Provisional sentence—Final judgment.

The mere fact of indorsing a non-negotiable instrument does not *per se* constitute the indorsee the legal holder unless there has been a *bona fide* cession of action.

A. cannot set off as against B. (A.'s creditor) a debt due by B. to C. although C consents, unless C has ceded his right of action to A.

Mr. Schreiner and Mr. Watermeyer appeared for the plaintiffs, the official liquidators of the above bank, and Sir T. Upington, Q.C., for the defendants.

This matter was before the Court on the 27th November last, when provisional sentence was granted for £1,300. The facts of the case are as follows: In June, 1890, the defendants had overdrawn their account to the amount of £1,300 as security for which the bank held gold scrip. As the bank demanded further security, Miss Ellen Forde, daughter of the senior member of the firm, placed at the disposal of the firm two fixed deposit receipts of the Cape of Good Hope Bank for £850 and £780, and a third of the Standard Bank for £500 (the latter having been drawn from the Standard Bank and placed in the Cape of Good Hope Bank at the bank's request). On the 30th June it was arranged that a promissory note should be passed and the scrip returned, the note to be payable on demand, with an understanding that it was to run for twelve months, the firm paying interest. The three deposit receipts, representing in all £1,630, were placed as security at the disposal of the bank, with authority and power to realise in case of failure to pay the note by the firm. Miss Forde signed the necessary document to pass the receipts into the bank's possession, and authorised the bank to use the receipts to extinguish the promissory note for £1,300 if necessary. On the 19th September the bank stopped payment, the note was presented, and Miss Forde gave her cheque on the bank. This the bank refused to accept, though in possession of the amount of the deposit receipts. The defendant firm now claimed the right to set off this amount against the note.

Mr. Allan Wright, examined by Mr. Schreiner, stated that he was until recently manager of the Cape Town branch of the Cape of Good Hope Bank. He saw Miss Forde the day on which the promissory note was given. He was of opinion that she first endorsed the receipts and afterwards

signed the pledge. The bank had paid 12s. 6d. in the £ in the liquidation. The bank had a further claim against the firm for £375 as security, for which it held Oriental gold shares.

Mr. Jeremiah Forde, senior partner of the firm of Forde & Co., stated that the bank at the time the promissory note was given held scrip which had cost his firm £8,000, the market value of which at that time was about £4,000. The bank accepted the deposit receipts and returned the scrip; as security for £375, the bank held 1,208 Oriental gold shares.

Miss E. Forde detailed the circumstances under which the deposit receipts were lodged with the bank and the pledge given.

Sir T. Upington, for the defendants, contended that on a strict question of law the plaintiffs could not succeed. Forde & Co., through Miss Forde's indorsement, were the legal holders of the receipts, and as soon as these had been accepted by the bank compensation took place.

Mr. Schreiner, for the plaintiffs, said that he could add nothing to the argument which had already been addressed to the Court when the case came on for provisional sentence and which was reported (8 Juta, 30).

The Chief Justice, in giving judgment, said that there was nothing new in the case. The law as laid down when the matter came before the Court for provisional sentence was still applicable. The mere fact of indorsing an instrument which was not negotiable could not pass the property. There must also be a cession of action, and as in this case there had been no cession there could be no compensation. Under these circumstances, judgment must be given for the plaintiffs with costs.

[Plaintiffs' Attorneys Messrs. Reid & Nephew, Defendants' Attorneys Messrs. Fairbridge & Arderne.]

PETITION OF THOMAS MULVIHAL.

On the application of Mr. Schreiner, authority was given to petitioner to cancel certain mortgage bond passed by James Copeland in favour of petitioner's father, who is absent from the Colony, and without any duly-appointed representative.

SUPREME COURT.

TUESDAY, JUNE 9.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

NIEHAUS V. NIEHAUS.

Divorce—Notice of trial—In divorce cases the defendant should have actual notice of the date of trial.

Mr. Searle for the plaintiff; the defendant in default.

This was an action for divorce. The parties were married, in community of property, in 1871, at Tulbagh, and there were four children of the marriage, three minors and one married. In the years 1889 and 1890 it was alleged the defendant committed adultery with a woman unknown to the plaintiff, and the prayer was for divorce, custody of the minor children, and a sum towards their common maintenance.

The Chief Justice remarked that the defendant had not had actual notice of trial.

Mr. Searle said that he had had notice that the trial would take place forthwith.

The Chief Justice said that it was better in cases of divorce that the defendant should have actual notice of trial.

Mr. Searle said that since he rose he had been informed that such notice had really been served, though he did not know it when he first addressed the Court.

The marriage having been formally proved,

Mrs. Niehaus deposed that she had four children of the marriage, the three youngest, boys, being with her. One was fifteen, one twelve, and the other nine. For twelve years after the marriage she and her husband lived at Tulbagh, but afterwards went to Beaufort West. Her husband was addicted to drink, and frequently ill-treated her. Last November her husband went to Piquetberg in the service of Combrinck & Co. He returned on the 23rd December, and told her he had committed adultery with a black woman at Piquetberg. She afterwards came to Cape Town, and whilst there received a letter from the respondent in which he confessed to unfaithfulness.

The Court ordered a decree of divorce, the plaintiff to have the custody of the children, and the defendant to pay £3 per month till the youngest child reaches the age of twenty-one Defendant to pay the costs.

[Plaintiff's Attorneys Messrs. Fairbridge & Arderne.]

BODLEY V. BODLEY.

Mr. Graham for the plaintiff, the respondent in default.

This was an action for divorce instituted by the husband, Joseph Horatio Bodley, by reason of the adultery of the wife, Christina Bodley. The parties were married at Kimberley in 1884, and it was alleged that in 1890 and 1891 the respondent committed adultery with Richard Johnson Partridge.

Plaintiff, a tobacconist at Kimberley, deposed that for about two years after the marriage he and his wife lived at Kimberley. At the end of that time respondent left for Cape Town on account of illness, and subsequently she also went to Port Elizabeth and Graham's Town. In 1890 Mrs. Bodley was living at the Clifton Hotel, Cape Town, and from information he received he instructed a private detective, named Loader, to make inquiries regarding his wife's suspected misconduct.

Arthur Wm. Loader, a private detective, gave evidence that in March, 1890, Mrs. Bodley and Partridge were living in the same house at Newlands, and that on one occasion he watched them retiring to the same bedroom. He was stationed outside from eight o'clock to a quarter to eleven, and watched their proceedings. He knew Mrs. Bodley, who told him she was plaintiff's wife, and that her husband was a tobacconist at Kimberley. He gained admission to the house by asking for apartments, and Mrs. Bodley did not know he was engaged by her husband.

Maria Abrahams, a coloured servant at the Clifton Hotel, stated that she was engaged there during the latter part of 1890. She knew Mrs. Bodley and Mr. Partridge. They were staying together at the hotel, and Mrs. Bodley on one occasion told witness her husband lived at Kimberley and was a tobacconist. She frequently saw Mrs. Bodley and Mr. Partridge occupying the same bedroom.

By the Chief Justice: Mr. Bodley never came to the hotel.

The Chief Justice asked if there were any photographs?

Mr. Graham said no, but Mr. Loader could take plaintiff to the house where Mrs. Bodley was now living.

The Chief Justice: You see there might be two Bodleys in Kimberley who are tobacconists?

The plaintiff, recalled, said there was no other tobacconist named Bodley in Kimberley but himself. He had destroyed some of the letters sent by his wife from the Clifton Hotel.

A decree of divorce was granted, the defendant to forfeit all benefits derivable under the marriage in community.

[Plaintiff's Attorneys Messrs. Fairbridge & Arderne.]

HONEYBORNE v. HONEYBORNE.

Will—Codicil—*Fidei-commissum*—Executors Testamentary and Dative—Bond—Gift or Loan—Shares in bank in liquidation—*Residuum*—Costs.

Mr. Schreiner appeared for the plaintiffs, and Mr. Juta and Mr. Watermeyer for the defendant.

This was an action instituted by the official liquidators of the Union Bank (in their capacity as executors dative of the estate of the late Julia M. C. Honeyborne, at the time of her death a registered holder of twelve shares in the Union Bank) against Mr. George Brittain (in his capacity as surviving executor testamentary of the estate of the late Mr. John Alfred Honeyborne) to recover the sum of £1,000, being the amount advanced by the late Mrs. Honeyborne to her husband's estate, with interest *a tempore moræ*. Mr. and Mrs. Honeyborne were married without community of property. Mrs. Honeyborne survived her husband. Mr. Honeyborne left a will bequeathing all his property to his children, but subject to the conditions that his wife should enjoy the usufruct and profits thereof during her lifetime. Mrs. Honeyborne and one Brittain were appointed executors. In his estate was some landed property on which there was a bond of £1,500 in favour of one Haupt. Mrs. Honeyborne's father, John Dyason, had shortly before died. By his will he had left half his property absolutely to his daughter, Mrs. Honeyborne. But to the will he added a codicil in these terms: "I will that the bequest in favour of my daughter, Julia, shall be subject to a *fidei commissum* in favour of her children, to the intent that my said daughter shall enjoy the uncontrolled use of the property during her lifetime, but that all that remains at her death shall go to her said children." Under Dyason's will Mrs. Honeyborne received about £1,200 in cash and twelve shares in the Union Bank. The shares were transferred into her own name. Out of the cash she received Mrs. Honeyborne paid £1,000 off the bond due by her husband's estate to Haupt. Mrs. Honeyborne died shortly after the stoppage of the Union Bank. She left a will bequeathing her property to her children, but the executors named in the will declined to accept. The liquidators of the Union Bank, as creditors of Mrs. Honeyborne for the amount due on calls on the shares had themselves appointed executors dative of her estate. They now sued the surviving executor of Mr. Honeyborne's estate to recover the £1,000. The declaration alleged that the £1,000 had been advanced to the estate of Mr. Honeyborne at the request of his executors. The plea denied the request by Mr. Honeyborne's executors, and alleged further that Mrs. Honeyborne had paid in

the money to benefit herself and her children who were alone interested in the estate of her deceased husband. The plea further set forth the codicil to Dyason's will, and alleged this £1,000 was recived from Dyason and that under the codicil this money was not the absolute property of Mrs. Honeyborne, but passed to her children at her death.

Replication: No gift by Mrs. Honeyborne in favour of her husband's estate was registered.

Mr. Schreiner for plaintiffs, called Mr. G. W. Steytler, one of the executors of Mrs. Honeyborne, and one of the liquidators of the Union Bank, who gave formal evidence.

Mr. Juta (with Mr. Watermeyer), for defendants, contended that under the codicil this money belonged to the children and the executors had no claim on it.

Mr. Schreiner: This codicil creates at most a *fidei commissum residui* and the fiduciary has the power to alienate at least three-fourths.

The Chief Justice: She has power to alienate, but she has not alienated and therefore the *fidei commissum* takes effect.

The Court expressed an opinion that the children would be entitled to this money, but it would be necessary for the executors of Mrs. Honeyborne to administer it.

After this expression of opinion Mr. Juta did not press the other defences raised in the plea.

The Chief Justice, in giving judgment, said that no attempt was made to prove that the £1,000 was a gift, so the Court must take it that it was lent. If it was money lent it was clear there was no alienation, and upon her death the £1,000 belonged to the children, who should claim it in her estate. The judgment would be for the plaintiffs, their costs to come out of Mrs. Honeyborne's estate, defendants' costs to be paid out of Mr. Honeyborne's estate.

[Plaintiffs' Attorney, C. C. de Villiers; Defendant's Attorneys Messrs. Van Zyl and Buissinne.]

STAPLES V. SWANEFELDER.

Pound Ordinance—Act 31 of 1875—Contravention—Trespass—Consequential damages—Resident Magistrate's decision—Appeal.

Mr. Schreiner appeared for the appellant, and Mr. Searle for the respondent.

This was an appeal from a decision of the Resident Magistrate of Middelburg, given in a case heard before him on the 12th March last. The appellant (the defendant in the Court below) was summoned by the respondent for having (as it was alleged) contravened Act 31 of 1875, section 8, in consequence of which the plaintiff (present respondent) sustained damage in the sum of £4 18s. 1d. The summons alleged:

Firstly, that the defendant wrongfully and unlawfully contravened the 3rd section of the Pound Act of 1875 by preventing the plaintiff, through the act of his (defendant's) servants, from satisfying the damage caused by the trespass of certain twenty-three horses belonging to the plaintiff (before the horses had been impounded), as the plaintiff would have done if defendant's servants had taken the horses to the pound by the nearest road thereto as required by law, but the defendant's servants avoided the nearest road, on which plaintiff was standing ready to release his stock, by which act the plaintiff was damaged as follows: (*a*) £1 8s., being the amount paid the poundmaster for inclosing and receiving the animals; (*b*) 2s. 6d., extra mileage which he would not otherwise have paid; (*c*) the costs of sending a man from his work to the pound to release the horses, 10s.

Secondly, that on the 24th February, 1891, the defendant again contravened the Act by refusing the sum of 6s. tendered to his son, who was acting for and on behalf of the defendant, as being sufficient to satisfy the damage caused by the trespass of nine horses and one stallion, the property of the plaintiff, by reason of which refusal the plaintiff had been damaged in the following: (*a*) Mileage paid for an extra driver, 2s. 7d.; (*b*) penalty enforced on a stallion at the pound, £1; (*c*) the impounding of nine horses and one stallion, 10s.; (*d*) journey into Middelburg to lodge complaint and commence action, £1 10s.; making a total of £4 18s. 1d. The Magistrate gave judgment for the plaintiff for 18s. on the first count, and for £3 5s. 1d. on the second count; from this judgment the defendant (now appellant) appealed.—Mr. Schreiner, in support of the appeal, contended that there had been no contravention of section 8, the horses had been driven by the nearest route to the pound. The road upon which the respondent was standing was a disused road, and there was no *onus* cast upon the appellant to travel by that road. He (counsel) submitted that the finding of the Magistrate on the first count was wrong. The second count was mainly based on consequential damages, and the Magistrate again erred in giving judgment for the plaintiff.

Mr. Searle, in reply, urged that the respondent was bound to drive the horses by the nearest road to the pound, and in any event he had no right to drive them, as he had done, across respondent's land. The expenses claimed in the second count were reasonable, and such as the Court would allow.

The Chief Justice, in giving judgment, said that the Magistrate had clearly erred in giving judgment for the plaintiff (respondent) on the

first count. There was nothing illegal in the defendant's taking the shortest route to the pound, and in his (the Chief Justice's) opinion there had been no contravention of the Act. With regard to the second count, the plaintiff would have been liable under any circumstances to pay £1 for the trespass of his stallion. The £1 10s. was purely consequential damage, which the Court never granted. Under these circumstances, the judgment of the Magistrate would be altered to that of one for the plaintiff for 12s. 7d., with costs in the Court below, the respondent to pay the costs of the appeal.

[Appellant's Attorneys Messrs. Fairbridge & Arderne, Respondent's Attorneys Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

WEDNESDAY, JUNE 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

COPELAND V. SHORT AND CO.

Sale—*Justus error—Restitutio in integrum*—Fixtures—Broker's note—Notice—Conduct of vendor such as to induce vendees to believe that they were buying articles which had previously been sold—Tender—Arbitration—Costs.

Mr. Schreiner and Mr. Shiel appeared for the plaintiff, and Mr. Searle and Mr. Castens for the defendants.

This was an action instituted by Mr. James Copeland until recently proprietor of the Phœnix Foundry Cape Town, against the defendants, Short & Co., owners of the Vulcan Foundry, for the sum of £150, being the first instalment of a sum of £300, the purchase price of certain iron foundry stock-in-trade sold by the plaintiff to the defendants on the 18th February last. The defence set up by defendants was that the purchase price of £300 included the price of a crane and two cupola-furnaces, which the plaintiff had failed to deliver. The defendants tendered the sum of £125, being the first instalment of £250, which they alleged was the full value of the articles which they had actually received or offered to go to arbitration in the matter. The plaintiff denied that the crane and cupola-furnaces had been included in the sale (they having, as a matter of fact, been already sold to Mr. W. C. Cooper, the purchaser of the Phœnix Foundry), and refused the tender offered. Upon these facts issue was joined.

The plaintiff deposed that the price agreed upon for boxes, patterns, and scrap iron was £205. He asked the defendants to take over the rest of the movables, and they offered £50, or about that. Nothing was said about the crane or the furnaces, or the engine and boiler. They were fixtures, with the shear-legs and mill. The crane and furnaces had been valued at £100, but he thought they were worth more. The crane was practically immovable from the building, of which it formed part. No man in the trade would call that a movable, article. The furnaces were sunk into the ground, and could not possibly be called loose property. In February, Mr. Sam Short asked what Mr. Cooper intended to do with the premises, and witness replied that he was going to run it as a foundry. Mr. Short said that perhaps Mr. Cooper would take the crane, and witness said the crane was Cooper's already. Short said he thought the crane was theirs, but witness said that was not so. After that the defendants continued taking delivery of the goods. The Shorts never claimed the furnaces until April.

Cross-examined by Mr. Searle: Mr. Short approached him on the question of purchase on the afternoon of the day on which Cooper bought the premises. He did not on that occasion deny that he had sold the place, nor did he then mention the crane or the furnaces. He had not brought the action because Cooper had claimed the crane and the furnaces. He pointed out the three movables that the Shorts were not to have, but the crane and furnaces were never once referred to, being fixtures.

Abraham Felix, until recently foreman to the plaintiff, stated that he was present on the 18th February when Messrs. Short came to the foundry. Mr. Copeland asked the Shorts to clear out the loose material, and they agreed, after some bargaining, to pay him £300. The crane and the cupolas were never once mentioned.

Cross-examined by Mr. Searle: He had never told a Mr. Taylor that the crane and the cupolas were included in the £300, nor did he tell that to Mr. Short.

Mr. W. C. Cooper, coachbuilder, deposed that he purchased on the 17th February the building and the crane and cupolas, which were included in the things detailed in his broker's note.

Mr. Gearing, of the firm of Cunningham & Gearing, gave it as his opinion that the crane and furnaces were worth £100 as they stood, to anyone continuing the foundry as a business.

Cross-examined: The crane had been in use for thirteen years, and the purchaser would have to take it down, by which some expense would be entailed. He would not himself have given £250

for what Messrs. Short had got. He meant by that what Messrs. Short pointed out to him, but that did not include the drilling machine, bellows, and anvils. He would not have given more than £50 for the crane and cupolas if he had had to remove them from the foundry and re-erect them.

By Mr. Schreiner: He did see not the mill, the large bellows, the shear-legs, the office furniture, or the drills.

By the Court: He would have given £220 for all the articles he saw at Messrs. Short.

Mr. Samuel Short, part proprietor of the Vulcan Ironworks, gave evidence that the only things excepted in the sale were the engine, the boiler, the blast-fan, the small bellows, the forge, the old brass, the pig-iron, and the platform scales. Mr. Copeland did not exclude the cranes and the cupolas. The man Felix had said to witness that he was under the impression that the crane and cupolas were sold to him and included in the £300. The only reason why he had offered £250 for the articles he had got was that he desired to keep the case out of court. The crane and cupolas, which were movable without much difficulty, were not worth above £50 to witness.

Cross-examined: There was no mention of £205, and he never agreed to pay that sum for part of the articles. There were not two transactions in the matter. He did not think Copeland told him the crane was Cooper's. At the time he spoke to Felix the cupolas had never been mentioned, but Felix volunteered the statement that witness had bought the crane and cupolas. Mr. Gearing valued the things on Tuesday at the request of witness. He had used the articles, as they had been required, in his business.

Mr. Thomas Short, brother of the last witness, deposed that plaintiff pointed out the crane and cupolas on the 17th February, and said that they were for sale. He had heard his brother's evidence, and said that it was correct. Everything was pointed out, and it was clearly understood that the crane and cupolas were included in the £300.

Mr. Taylor, an engineer at the Docks, examined by Mr. Searle, stated that he had seen most of the articles bought by the defendants. He considered the price given a fair one. He had valued the lot at £226. There was a good deal of rubbish, and this he had included under the heading of *et ceteras*.

This concluded the evidence. The hearing of the argument was postponed until to-morrow.

SUPREME COURT.

THURSDAY, JUNE 11.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

UNION BANK V. SHACKELL.

Mr. Schreiner moved for final adjudication of the defendant's estate.—Granted.

REHABILITATIONS.

On motion from the bar, the rehabilitation of the following insolvents was granted: Cornelis W. du Plooy and Johannes Abraham Benjamin van Wyk.

GENERAL MOTIONS.

PETITION OF CATHERINE J. M. TRUTER.

Mr. Watermeyer moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, custody of the minor children, and division of the estate.

Referred to counsel for his certificate.

PETITION OF EXECUTORS OF THE ESTATE OF PIENAAR.

Mr. Maskew moved for authority to the Registrar of Deeds to correct an error in the deed of transfer relating to three erven in the village of Bethesda, by substituting the name Jacobus for that of Johannes.

The Chief Justice remarked that it was extraordinary how frequently these mistakes occurred.

A rule *nisi*, returnable July 12, was granted, calling upon the parties concerned to show cause why the alteration should not be made. Notice of the rule to be published in the *Government Gazette* and in a Graaff-Reinet paper.

PETITION OF THE MASTER OF THE SUPREME COURT.

Mr. Giddy moved for the appointment of a *curator ad litem* in proceedings about to be instituted by the authorities of the Old Somerset Hospital to have one Ryno J. M. Buxman declared of unsound mind and incapable of managing his affairs.

The order was granted, and Mr. Tredgold appointed *curator ad litem*.

BURGERS V. BURGERS.

This case was postponed till next term, and Mr. Juta, as *curator ad litem*, requested to make inquiries as to the case for the minor heirs interested.

BULTFONTEIN MINING BOARD V. LONDON AND SOUTH AFRICAN EXPLORATION COMPANY AND ARMSTRONG.

Mr. Schreiner made an application for the fixing of a day out of term for the hearing of this case.

The Court fixed June 24 as the day on which the action will be heard.

ABRAHAMSE VS. ABRAHAMSE.

Mr. McLachlan for the plaintiff; defendant in default.

This was an action for divorce, instituted by the husband by reason of his wife's adultery.

The plaintiff, Dirk Abrahamse, deposed that he was married in 1860, there were two children of the marriage. His wife left him about eighteen years ago, and had not lived with him since.

Sophia Abrahamse, plaintiff's daughter, gave evidence of her mother's infidelity with one John Lissenberg at the house where witness worked.

Plaintiff, recalled, said he had waited eighteen years to get his divorce because he had not been able to pay the costs.. He sued now *in forma pauperis*.

A decree of divorce was granted.

COPELAND V. SHORT AND CO.

The hearing of this case was resumed.

Mr. Schreiner and Mr. Shiel appearing for the plaintiff, and Mr. Searle and Mr. Castens for the defendants.

Mr. Schreiner argued that it was clear that nothing had been said when the sale took place about the crane and cupolas, and it was impossible that Copeland could have intended to sell to the Shorts what he had already sold to Cooper. He contended that, the defendants not having followed the course prescribed by the law, the plaintiff was entitled to a verdict upon the contract. When the Shorts found that Copeland would not give them the cranes and cupolas he submitted that they should at once have sent back the goods they had taken. Instead of that, however, they continued taking delivery, and had used and sold some of the articles. Defendants by their own acts had rendered a *restitutio in integrum* impossible. Counsel, in his argument, referred to the following authorities: "Benjamin on Sale," 4th edition, 887, 898, 946; "Logan v. Beit" (7 Juta 197); "Harnor v. Groves" (15 C.B., 667).

The Chief Justice remarked that cases of this sort sometimes led him to think of the superiority, in some respects, of the English law, under which sales of the value of over £10 were made in writing. Had such a course been followed in the present case, the Court could have let the writings speak for themselves.

Mr. Searle, for the defence, contended that the plaintiff found that he had sold to two persons—Cooper and Short & Co. Copeland was in the position that he had actually sold some of the fixtures, the mill, and the shear-legs, and the evidence of the Shorts was clear on the point that he also sold them the crane and the cupolas. The plaintiff had misled the defendants, and therefore could not recover on the contract. The element of value was important in the case, the parties being men of experience, and the evidence of Mr. Gearing, brought by the plaintiff, was to the effect that the goods the Shorts were asked to pay £300 for were at a liberal valuation not worth more than £250. The whole difficulty had arisen because the plaintiff had inadvertently sold to two parties, and he must in law take the consequences of his own error. He proceeded to quote "Irvine & Co. v. Berg" (Buchanan, 1879, p. 183). His clients had several times informed Mr. Copeland that the cash was ready whenever delivery was completed, or they were prepared to return the goods they had got.

The Chief Justice, in delivering judgment, said the Court always had a difficulty in deciding in cases like the present where there had been a conflict of evidence. The broker's note was certainly in favour of the plaintiff, inasmuch as the crane and cupola-furnaces were specially mentioned as having been sold with the premises to Mr. Cooper. The plaintiff, however, did not show the broker's note to the defendants, and there was no evidence that the defendants had notice that the articles in dispute had already been sold. Again, the conduct of the plaintiff was such as to induce the defendants to believe that they were really buying the crane and furnaces. Under all the circumstances of the case, he was inclined to think that the defendants were entitled to a verdict. Judgment would therefore be for the plaintiff for £125, the amount of the tender with costs up to date of plea, the subsequent costs to be paid by the plaintiff. With regard to defendants' claim in reconvention, the judgment would be absolution from the instance.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne; Defendants' Attorneys, Fairbridge & Arderne.]

SUPREME COURT.

FRIDAY, JUNE 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

CHURCHWARDENS OF THE DUTCH REFORMED CHURCH, ALIWAL NORTH V. GREEN.

Lease — Reduction of rent — "Unlimited period"—New arrangement — Construction.

Mr. Searle for the plaintiffs; Mr. Schreiner for the defendant.

This was an action instituted by the Kerkraad of the Aliwal North Dutch Reformed Church to recover from the defendant, Mrs. Green, £315, alleged to be due upon a written lease between the parties. The declaration set forth that on the 17th April, 1883, a written agreement was entered into between the parties, and a lease signed for the tenancy of certain premises for ten years, as from the 26th November, 1881, the rental to be £315 per annum, payable every four months. The defendant entered into possession of the premises, and in 1888 was in arrear with her rent. On October the 20th the plaintiffs agreed, in consideration of bad times, to make a temporary reduction in rent, as from the 26th April, 1888, to £100 a year. On November 26, 1889, defendant was given notice that the reduction would no longer be allowed, and that from March 26, 1890, the rent would have to be paid in accordance with the terms of the lease. Defendant refused to pay the rent and was sued in the Resident Magistrate's Court at Aliwal in June, 1890, for £100, being part of the rent. The defendant excepted to the summons on the ground that the sum in dispute was beyond the jurisdiction of the Magistrate, but the Court overruled the objection and gave judgment for the plaintiffs, whereupon defendant appealed to the Eastern Districts Court, which reversed the decision of the Magistrate. The plaintiffs claimed £315, a full year's rent, now due. The defendant admitted the formal facts, but said that in October, 1888, the lease was set aside in respect to its terms and the annual rental, and that it was thereupon agreed that the premises should be leased for an unlimited period at an annual rental of £100, as from July, 1888. Defendant admitted that notice was given her, and the old rental was to be charged again, but said that such notice did not bind her, a new contract having been entered into. She tendered £100, being the amount of all the rent she stated to be due.

Mr. Johannes Stephanus de Wet, a member of the Kerkraad, gave evidence in Dutch as to the action of the Kerkraad, and the correspondence between the parties.

By Mr. Schreiner: The property had undergone considerable improvements whilst in the plaintiff's possession.

Mr. E. G. Ormond, M.L.A., of the firm of Sauer & Ormond, plaintiff's attorneys, stated that he would not receive the £100 which was tendered, because he did not consider it a legal tender Mrs. Green was a wealthy woman.

The defendant deposed that she was only getting £50 a year from the premises at present, and had never received £100 on account of the property since the reduction took place. She had paid no rent since November, 1889, but had always been ready to pay at the rate of £100 per annum. After November, 1889, the Kerkraad refused to take payment at £100 yearly. The lease gave her the option of renewal for a further period of twenty-three years, but she was unable to continue the lease at £315 per annum. She had spent £1,600 on the property, and was prepared to continue the lease for twenty-three years at £100 yearly. The Kerkraad was anxious to resume possession of the land she held, in order to erect a parsonage upon it.

Mr. Searle, in addressing the Court, said that the Court had simply to construe the agreement between the parties. If the defendant's contention were to be accepted by the Court it would mean that the defendant could retain possession of the property for ever at an annual rental of £100. It was clear that the expression "unlimited period," used by the Kerkraad when it authorised the reduction, simply meant a period determinable by the Kerkraad.

Mr. Schreiner argued that when the Kerkraad granted the reduction it terminated the old lease and commenced a new arrangement. Mrs. Green had always been willing to hand over to the Kerkraad anything over £100 which she received upon the property.

The Chief Justice in giving judgment said that the terms of the lease were clear and distinct. In October, 1888, Mrs. Green obtained a reduction of rent for an indefinite period, and it was clear that was a favour, a mere grace on the part of the Kerkraad to Mrs. Green. The arrangement was clearly subject to notice by the churchwardens, and in 1889 they resolved to revoke the favour granted to Mrs. Green. If the notice had been given after November, 1889, there might have been some force in the argument of counsel for the defence, but notice was given before that time. Judgment would be given for the plaintiffs with costs.

[Plaintiffs' Attorneys, J. W. Sauer; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

WHEELER V. WHEELER.

Mr. Molteno for the plaintiff, defendant in default.

This was an action by the husband, William Andrew Wheeler, for restitution of conjugal rights, failing which for divorce, by reason of the wife's desertion. Plaintiff married in 1876, and in January, 1890, his wife left him. She went to Cape Town for medical advice, and had since refused to come back to him, her excuse being that she did not care to live at Simon's Town, where plaintiff lived.

The Chief Justice said that the wife had written to the Registrar stating that owing to expected confinement she was unable to attend the Court.

The Court granted the order as prayed, defendant to return to the petitioner within a certain period, failing which to show cause on the last day of next term why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne.]

WILSON V. WILSON AND MINNAAR.

Mr. Molteno for the plaintiff; Mr. Juta for the defendant Wilson.

This was an action for divorce by the husband against his wife, Jane Wilson, by reason of her alleged adultery with the defendant Barend Minnaar. The plaintiff sought a decree of divorce, £100 damages against the defendant Minnaar, and the custody of his children. The defendants pleaded separately. The first defendant denied the adultery, and claimed in reconvention a separation and the custody of the children, and alleged that her husband had committed adultery with one Sannie van Wyk. The second defendant denied the adultery, and set up the plea that the plaintiff was debarred from suing him by reason of his own adultery with Van Wyk.

Mr. Molteno stated that all the parties resided at Fraserburg, where the plaintiff was post-cart driver. The evidence was taken at Fraserburg on commission, and counsel remarked that all the gossip of the neighbourhood appeared to have come up.

The evidence taken on commission having been read,

The Chief Justice, in giving judgment, said that all the parties concerned were equally guilty. The judgment of the Court would be absolution from the instance with regard to the claim in convention, and in reconvention, one farthing damages would be given against the defendant Minnaar, each side to pay its own costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorney, C. F. Piers.]

MILLER V. RICHMOND LICENSING COURT.

Licence—Act 28 of 1883, sections 42, 47 and 48—Rights of Licensing Court—Refusal to grant licence—190 rule of Court—Review.

Sir T. Upington, Q.C., appeared for the appellant; and Mr. Searle for the respondents.

This matter came on review under the 190th rule of Court from a decision of the Licensing Court of Richmond refusing applicant a hotel licence, on the grounds that the said refusal was informal, irregular, and contrary to law. The appellant claimed that he was entitled to a licence, and prayed for costs *de bonis propriis* of certain members of the Licensing Court.

Sir T. Upington said that his contention would be twofold: (1) That the formalities of the law had not been complied with; and (2) that the evidence on oath which appellant had tendered had not been accepted. Counsel then referred to Act 28 of 1883, and contended that the refusal of the Licensing Court could not have been under the 48th section; they must then have proceeded under section 47, in which latter case he submitted their action was illegal.

The Court, without calling upon Mr. Searle, gave judgment.

The Chief Justice said that Sir T. Upington had argued the case very clearly and very fairly, but he (the Chief Justice) was of opinion that the Licensing Court had acted quite within their rights. His lordship then referred to the 47th section, and said that the petition upon which the licence had been refused set forth sufficient reasons for the refusal. With regard to the second contention, the 42nd section did not make it compulsory to take the evidence upon oath, the Court had a discretion, which in the present case they had exercised. The application would be refused with costs.

[Appellant's Attorney, Paul de Villiers; Respondents' Attorneys, Messrs. Fairbridge & Arderne]

WRIGHT V. THE COLONIAL GOVERNMENT.

Mr. Searle (with him Mr. Schreiner) applied for the issue of a commission to take the evidence, *de bene esse*, in London of witnesses for the plaintiff.

Mr. Jones, for the defendants, consented.

The Court granted the order as prayed for, with leave to the defendants to produce evidence.

Mr. Prichard, barrister-at-law, was appointed commissioner.

PETITION OF MARGARETHA A. RICHARDS.

Mr. Tredgold moved for a rule *nisi* calling upon petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion. It appeared from an affidavit read that Mr. Richards deserted his wife about twenty years ago, and was last heard of in 1885, when he was supposed to be in living in Ontario, Canada.

The Court granted a rule *nisi*, returnable on the 20th November next, publication of the rule to be made in the *Ontario Globe*, the intendit to be served with the rule.

Mr. Tredgold was appointed counsel, and Messrs. Reid & Nephew attorneys.

SUPREME COURT.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

SATURDAY, JUNE 13.

PROVISIONAL ROLL.

SLUITER AND NESER V. MEDCALF.

Promissory Note—Provisional sentence—Supreme Court Costs—A. v. B. (Buch. 1868, p. 240) considered—Act 20 of 1856, section 35.

Mr. Watermeyer moved for provisional sentence on a promissory note for £5 odd.

The Chief Justice asked why the case had not been brought in the Magistrate's Court.

Mr. Watermeyer said that one of the parties lived at Colesberg, and he submitted that the plaintiff had a right to sue in the Supreme Court.

The Chief Justice: Yes, but should the Court allow Supreme Court costs?

Mr. Watermeyer cited the case "A v. B" (Buchanan, 1868 p. 240), in which a defendant residing in Port Elizabeth was sued by a plaintiff residing in Uitenhage for an amount of about £12, and although the Court was inclined to grant only Magistrate's Court costs, it was found by the Act of 1856 that the matter was beyond the discretion of the judges, and Supreme Court costs were given.

Mr. Justice Smith: But in that case the plaintiff could not sue in the Magistrate's Court in Cape Town.

Mr. Watermeyer: That is so, my lord.

The Chief Justice said he was informed that the costs of provisional sentence would amount to £8. The attorneys might just as well have sued in the Magistrate's Court. It was clear that although the Court must grant the order the Act needed amending.

Provisional sentence was then granted.

STANDARD BANK V. JOOSTE.

Mr. Searle moved for provisional sentence on a mortgage bond passed in January, 1887, in favour of one Quinn, and ceded by him to the bank. It was for the sum of £606, with interest at 7 per cent. from December, 1886. Notice had been served on the defendant.—Provisional sentence.

MELLISH V. FLORIS.

Mr. Watermeyer moved for previsional sentence on a mortgage bond for £70, passed by the defendant in favour of one Geyer, and ceded by him to the plaintiff, with interest from February, 1890, at 6 per cent.—Provisional sentence.

SICHEL V. KANNEMEYER.

Mr. Juta moved for provisional sentence on a mortgage bond for £300, with interest from February, 1889.—Provisional sentence.

H. ROSS AND CO. V. PERLE.

Mr. Shiel moved for judgment for £77 8s. 2d. balance of account for goods sold and delivered.—Judgment granted.

THE MASTER V. BUXMAN.

De lunatico inquirendo.

Mr. Giddy appeared for the Master; and Mr. Tredgold as *curator ad litem* for the respondent.

This was an application by the Master of the Supreme Court, in whose hands £160 is placed on behalf of Buxman, for an order declaring him of unsound mind and incapable of managing his affairs.—Dr. Cox, surgeon in charge of the Old Somerset Hospital, stated that the patient, who was admitted to the hospital sixteen years ago under the name of Buxman, was suffering from chronic mania bordering on imbecility. He was incapable of managing his affairs. He was about 32 years old, and likely to become less sane as he grew older.

The Chief Justice asked if anyone had identified the man as Ryno Buxman.

Dr. Cox said that the superintendent remembered Buxman's grandmother visiting him. There seemed no doubt that his name was really Buxman.

Mr. Tredgold said that on Friday he visited the alleged lunatic, who told him his name was Ryno Buxman and that he wanted someone to manage his property. He appeared very weak-minded indeed.

Mr. Justice Smith: Has the man been detained sixteen years as a lunatic without the Court being approached?

Mr. Giddy said that a Magistrate's order had been secured, and that was sufficient.

The Court declared Buxman incapable of managing his affairs, appointed Dr. Cox curator of his person, and authorised the Master to pay £24 per year for the maintenance of Buxman at the Hospital.

HILL AND PADDON V. COLONIAL GOVERNMENT.

Mr. Juta for the plaintiff; Mr. Schreiner for defendants.

Judgment in terms of consent paper put in was ordered.

REHABILITATIONS.

The Court granted the following rehabilitations: Isaac Stephanus Jacobus Marais, William Thomas Birch, Christian Stephanus du Plessis, Alexander Thompson, William Jacobus van der Merwe.

PETITION OF THE TOWN COUNCIL OF PORT ELIZABETH.

Mr. Searle moved for an order authorising the Sheriff to rank petitioners in the distribution of the proceeds of certain derelict lands, sold by order of the Court, for the purchase price of such lots as remained unpaid for by the original buyers at the sale held in 1863.

The Court granted an order authorising the Sheriff to pay to the Master the balance of the proceeds, in terms of the Derelict Lands Act, and also a rule *nisi*, calling upon W. S. Craig, John Dixon, and John Passmore, or their lawful representatives, to show cause on the last day of next term why the proceeds should not be paid to the applicants, in terms of the seventh of the conditions of sale, the rule to be published three times in the *Gazette*, once in each of the Port Elizabeth papers, and once in the Graham's Town *Journal*.

ROTHWELL V. ROTHWELL.

Mr. Jones moved for the issue of a commission to take the evidence, *de bene esse*, of petitioner's witnesses at Port Elizabeth in the suit instituted by him for divorce.

The order was granted as prayed, petitioner to be responsible for the costs of the commission.

WILSON V. WILSON.

The Chief Justice ordered an addition to the judgment in this case, to the effect that each side should pay its own costs, but that the defendant Minnaar should pay the costs of the commission, which the Court assessed at five guineas. The Court was of opinion that the relevant evidence could have been taken in much less time, and considered that five guineas was sufficient costs.

SMALL V. FRAMES.

Mr. Schreiner moved for leave to the defendant to sign judgment against the plaintiff by reason of his failure to proceed with his action after due notice.

The Court granted absolution from the instance with costs, by consent.

IMAUM GASIEP V. SALIE AND ANOTHER.

Imaum or Mahomedan priest—Interference with in performance of his duty in the mosque by rival priest — Possession — Interdict.

Mr. Juta moved for an order restraining the respondents from interfering with applicant in the discharge of his duties as Imaum, or priest, of the congregation worshipping in the mosque known as that of Imaum Hadje.

Mr. Searle appeared for the respondents.

Mr. Juta read the affidavit of the applicant, who stated that, upon the death of the late Imaum Abdol Kariem, he was appointed Imaum of the mosque. About a year ago he raised the first respondent to the position of an elder of the church The second respondent, Sheikh Abdol Azizzi, was a native of Mecca, and applicant allowed him to preach at the Sunday midday services from time to time. No permanent arrangement, however, was made, and applicant himself conducted all the other services. Since the return from Mecca of the second respondent, he had again requested permission to preach, but inasmuch as he had caused dissension and disturbance among the congregation, applicant refused to permit this. Nevertheless the said respondent on one occasion forced open the door, and applicant was now prevented from conducting the

services, and deprived of his just rights as Imaum of the congregation.

Mr. Searle read the answering affidavit of the first respondent (Hadje Salie), who stated that he was a regular attendant at the mosque, and that the second respondent (Sheikh Abdol Azizzi) was appointed Imaum of the whole congregation, but as the applicant had been for a long time in the service of the church he was allowed to remain as Imaum of the sick and the dead. The applicant was to take lessons in the duties of an Imaum from deponent and the second respondent, but only took a few lessons. The said applicant was incompetent to perform the duties of an Imaum, and the sheikh always preached at the midday services. The said applicant had no power of appointment over the sheikh, and whatever gatieps and bilals the said applicant appointed were appointed in secret, and not by the whole congregation. The sheikh had caused no disturbance or dissension, and the applicant had never conducted the services at the mosque. The applicant had no power whatever over the sheikh, being of much lower rank. The applicant was deposed from office as sub-Imaum because he prevented several hundreds of worshippers from attending the mosque on a high festival. The mosque was open to all Moslems, and it was a serious act to close the doors on high church days. The members of the congregation of the said sheikh were about 300, whilst the so-called followers of the applicant did not number fifty. The affidavit of Sheikh Abdol Azizzi, also read by Mr. Searle, confirmed the affidavit of Hadje Salie, and stated that deponent appointed applicant Imaum of the sick and the dead only. The affidavits of Hadje Magmoet, Abdol Burns, and other members of the Moslem community were also read, and bore out the statements of the respondents.

Mr. Justice Smith: In a case of the misbehaviour of an Imaum, who has the power to remove him?

Mr. Searle said he believed the congregation had great powers.

The Chief Justice: Has not this case been before the Court before?

Mr. Searle said that there were three mosques in Chiappini-street where this one was, but he was advised that the case of this mosque had not been before the Court before.

Mr. Justice Smith: Assuming the congregation has the power, I suppose there is some ordinary method followed?

Mr. Searle said that there had been a regular meeting, at which the applicant was dispossessed of his office of sub-Imaum.

Mr. Juta read a replying affidavit of the applicant, to the effect that there was only one Imaum of the whole church, and no such official as Imaum of the sick and the dead. Applicant was the senior gatiep in office when the late Imaum Kariem died. At his death he appointed applicant his successor, and seventy days after his death the nomination was solemnly confirmed by the congregation, since which time the various services at the mosque, and the funeral services of the members who had died, had been performed under applicant's direction. The statement that he took lessons was untrue, inasmuch as he was already fully competent in the services of the mosque as Imaum, and had performed them for many years. He appointed the various gatieps and bilals in open congregation, and they still held office under him. As Imaum he was custodian of the mosque, and when respondents desired to use the mosque as a meeting-house he refused to let them have the key, whereupon they broke open the door. Counsel also read the affidavits of sixteen bilals and gatieps of the mosque, to the effect that the applicant's affidavit was correct, and that he was the true Imaum.

Mr. Searle said he had an answering affidavit to that, but Mr. Juta objected to its being read.

Mr. Juta said that when an Imaum died he had the right of appointing his successor, but the congregation had a right of confirmation, and the applicant had been so appointed. For the last three years he had conducted the services, and then the gentlemen from Mecca, with several cartloads of Claremont Malays, who had no concern in the matter at all, stepped in and forcibly entered the place. The office-bearers of the mosque were unanimous in stating that applicant was the Imaum.

The Chief Justice suggested that both parties might consent that the Court should appoint a gentleman to call a meeting of the congregation and take a vote, but

Counsel pointed out that there would be considerable difficulty in deciding who were members of the congregation.

Mr. Justice Buchanan: Is there no book of church membership?

Mr. Juta: I am afraid not, my lord.

Mr. Searle said that before an interdict was granted possession had to be shown, and this the applicant had not done. The sheikh appeared to be the ruling official, and was apparently supported by all the leading members of the Moslem community in Cape Town. The fact that it had been found necessary to call in the police showed that a very large portion of the congregation was in favour of the sheikh as Imaum of the mosque.

Mr. Juta: We have the original key and they have a duplicate.

The Chief Justice suggested that alternate services should be held until the dispute was settled.

Mr. Searle stated that his client was perfectly willing for an action for declaration of rights to be brought as early as possible.

Abdol Sneker, a worshipper at the mosque during the last ten years, said that Gasiep was never Imaum because he never preached, but during the absence of the sheikh at Mecca he was appointed to act in the sheikh's place.

By Mr. Juta: The sheikh was high above the late Abdol Kariem and Gasiep, but that did not prevent Kariem being Imaum. The sheikh was a kind of bishop of the church.

Abdol Gasiep, the applicant, stated that seventy days after the death of the late Kariem he was solemnly appointed Imaum of the mosque in full congregation, but after he had been in office about fourteen months difficulties, caused by the sheikh, began to arise. He had never visited Mecca, but was fully competent to act as Imaum, and could read the Koran.

The Chief Justice, in giving judgment, said that the laws of the Moslem community were so very vague that it was difficult for the Court in these cases to be perfectly satisfied as to the real rights of the parties, but in the present case it did appear that the applicant, Abdol Gasiep, was recognised as the nominal Imaum upon the death of Kariem. As such he would be entitled to the key of the mosque, although it might be left with one of the members of the congregation for the more convenient use of the congregation. The applicant, in order to secure his rights, had a padlock placed upon the door, whereupon the respondent by force opened the door, entered the mosque, and interfered with the rights of the applicant as Imaum. He appointed a man to preach for him, but before he could ascend the pulpit the nominee of the respondents did so, and in that way prevented the applicant in the discharge of his duties. It struck him that this was a case in which some members of the congregation, who were for the new order of things, objected to this old applicant, who was of the old order. Many of the members of the community had gone to Mecca, and some who had come from Mecca were more learned than the old members who had remained here, and no doubt some of the congregation felt discontented with the old order of things. These questions, however, were not now before the Court, which had to look at possession. He thought the applicant was in possession, and therefore the Court ought to grant an order. The order would be granted as prayed, with costs against the respondents in the first instance, but with leave to the respondents to proceed by action for a declaration of rights.

[Applicant's Attorney, W. E. Meore; Respondents' Attorney, J. C. Berrangé.]

SUPREME COURT.

MONDAY, JUNE 15.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN].

STEGMANN V. COHEN, AND COHEN V. STEGMANN.

Goods sold and delivered — Action — Promissory Note—Ordinance 6 of 1843, section 19 – Malicious sequestration of estate—Cross-action—Damages.

These two cases were taken together. Mr. Searle and Mr. Graham appeared for Stegmann, and Mr. Juta and Mr Castens for Cohen.

The first of these was an action brought by Johannes Augustus Stegmann, of Newlands, against Ebenezer Cohen, a storekeeper, of Sutherland, for the recovery of a certain sum of money. Between July and December of last year, the defendant became indebted to the plaintiff in the sum of £997 9s. 5d. for goods sold and delivered, and cash advanced. On the 15th December, 1890, the defendant signed a promissory note payable on April 15, 1891, for £381 5s., being portion of the said debt. An amount of £50 18s. 5d., due from the plaintiff to the defendant, had been deducted by the plaintiff from his debt, and the balance now due to the plaintiff, according to his declaration, was £565 6s. on the open account, and £381 5s on the promissory note. Since the issue of the summons, the £381 5s. on the promissory note was sued for. The suit was before the Court on the 15th May, 1891, and provisional sentence was granted, and a portion of the money had been paid, goods being at present under attachment to satisfy the remainder. An account was annexed to the declaration showing the amounts alleged to be due to the plaintiff. The defendant pleaded that the plaintiff had sold to him goods to the amount of £901 13s. 3d., the amount alleged to be due by the plaintiff, the remainder being for cash advanced. The defendant, however, alleged that the £901 13s. 3d. was owing at two years' credit, with interest at 6 per cent., from July, 1891, to the time of payment. The defendant also admitted £95 16s. 2d., but said the Plaintiff was indebted to him in £50 18s. 5d. and £67, the £50 18s. 5d. for the rent of certain premises and £17 for cart hire. Consequently, according to the defendant, there was now owing to the plaintiff the difference between £117 18s. 5d., made up of £50 18s. 5d. and £67, which the plaintiff disputed, and £95 16s. 2d., namely £22 2s. 3d. The disputed items were three in number,

£901 18s. 8d., alleged by the defendant to be subject to two years' credit; £50 18s. 5d., and £17. The second case arose out of the first. It was an action brought by Cohen against Stegmann for £1,000 damages for wrongful sequestration of his estate. The declaration stated that in March, 1891, the defendant presented a petition for the sequestration of the estate of Cohen, and that on the 13th April the order was discharged, but in the meantime the place of business of the defendant was closed. There was an alternate claim, that the defendant falsely and maliciously and without reason procured the plaintiff's estate to be sequestrated. The defendant's plea admitted that the petition was granted, and that the order was discharged on account of the non-valuation by the defendant of certain securities alleged to be of but trifling value. The defendant pleaded that he had only protected his own interest, and had borne no malice against Cohen. Counsel stated that the plaintiff in the second case proceeded under the Insolvent Ordinance and the common law, and the Court would have to decide whether at the time the petition was granted the estate was, as the defendant pleaded, actually insolvent.

Johannes Augustus Stegmann deposed that the transaction arose in Sutherland, to which place witness was sent by Hamilton Ross & Co. in connection with the business of Otto & Co., Sutherland. He agreed to take over certain goods of Otto's, and afterwards Cohen, who was in business at Sutherland, agreed to take the store and the stock over, at six months' credit. It was not true that witness granted two years' credit to Cohen. Cohen desired to borrow £70, and when witness refused to lend him that sum, suggested witness should pay off the creditors in full, witness looked into the concern, but was surprised to find that the defendant's debts were £800. Subsequently witness offered to take 5s. in the £ for his claim, but defendant refused to pay even that. In March witness gave notice to the defendant to vacate the store, the rent not having been paid. From what he knew of Cohen's books he considered Cohen decidedly insolvent—at the time he presented the petition in insolvency against him.

By Mr. Juta: He was aware that in country storekeeping long credit had to be given to the farmers, who paid in the wool season. He considered there were two wool seasons in the year at Sutherland. He never asked Cohen to assign his estate in witness's favour. What witness desired was a general assignment After the order of sequestration was granted Cohen continued selling, as was evidenced by his books. He never agreed to pay Cohen £5 a month for the rent of a small store at Sutherland, or indeed any sum. With regard to the £17 for cart hire, Cohen offered him the loan of his cart free of charge. He used the cart about eight or nine days altogether. It was not true that at the meeting of creditors he denied having offered to accept 5s. in the £ in settlement of his claim.

Ezekiel Cohen gave evidence that when Stegmann offered the goods at six months he refused to take them, whereupon Stegmann offered two years. The usual course of business in the country was to give farmers a year's credit. He could not possibly have got in enough money in six months to pay Stegmann. In addition to Stegmann, he bought goods from many other firms in Cape Town, and was doing a good paying business. Whilst Stegmann was in Sutherland he asked witness to pay out the other creditors at 2s. 6d. in the £, and himself at 20s. in the £, but witness refused to make any such arrangement. Stegmann and Van Eyk, his agent, at the time they advised witness to surrender his estate, had already let a part of the store to another person. It was not true that witness refused Stegmann's offer to take 5s. in the £. He accepted it. The store was closed a month under sequestration, but was opened again in April. Before the place was closed witness was making from £80 to £120 per month cash, and a similar amount in credit sales. Since the reopening he had paid off many creditors. He had paid off the whole off Stegmann's note for £881 5s., and about £400 in addition, but in consequence of the sequestration proceedings business had been exceedingly difficult. He was also running a hotel business, from which he received amounts up to £80 per month. He had recently sold his share in the hotel for £150. His wife conducted a boarding-house at Sutherland, but that was her concern alone. In consequence of the action of Stegmann witness heard that other creditors were going to press him, so he called a meeting of creditors. He did not sell goods while the place was under sequestration. At present he had £800 worth of stock, and his debts, including Mr. Stegmann's, were far less. He was perfectly solvent.

By Mr. Searle: He admitted Stegmann had no security, but he gave witness two years' credit all the same. Stegmann also became security to Wilman, Spilhaus & Co., Zeederberg & Duncan, and G. W. Steytler & Co, for money owing by witness. He kept a writ issued against him a few days, but it was under a mistake. He was asked to give a small parcel to Mr. Van Eyk, whom he did not see for some days after. He did not know the parcel contained a writ.

The Chief Justice: If he had known he might have lost the parcel on the way.

SUPREME COURT.

TUESDAY, JUNE 16.

[Before the Chief Justice (Sir J. H. DE VILLIERS K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

STEGMANN V. COHEN AND COHEN V. STEGMANN.

The hearing of this case was resumed. Mr. Searle and Mr. Graham appeared for Stegmann. and Mr. Juta and Mr. Castens represented Cohen,

Carl Engelen, a storekeeper at Sutherland. called by Mr. Juta, gave evidence that after the sequestration of Cohen's estate he valued his whole stock and assets, including the outstandings and everything else. In his opinion Cohen was perfectly solvent, and could pay all his debts, Stegmann's included.

By Mr. Searle: He was one of the creditors of Cohen, but was in favour of giving him time, and had been all along. He believed Cohen's assets were quite £160 over his liabilities. Goods were generally sold at 100 per cent. profit at Sutherland, and he valued the stock very low indeed. If 25 or 50 per cent. profit were realised Cohen would have been perfectly solvent. Witness admitted that if the books could be made to prove that Cohen ever since he started had sold goods at cost price he would be insolvent. At that rate nobody would be solvent. He took the stock to be worth about £1,400, but Stegmann offered it to witness for £700.

Gert Cloete, a farmer, to whom Cohen owed money at the time of the sequestration, deposed that Stegmann told him Cohen could not pay him. Thereupon he sued Cohen and was paid. He would not have pressed Cohen but for what Stegmann told him.

By Mr. Searle: His brother went and asked Stegmann what Cohen's position was, but witness never asked Stegmann about Cohen. He was fully satisfied with his security.

Benjamin Cohen, brother of defendant, corroborated the evidence of Engelen as to the value of Cohen's stock.

Mr. Searle called Ryk le Sueur Stegmann, formerly bookkeeper with Otto & Co. and afterwards with Cohen, who stated that when the sequestration order was made he valued the stock at £700. He considered that a pretty fair business was done by Cohen, but as a fact whilst he was there more money went out than came in.

By Mr. Juta: Cohen was constantly buying new stock when witness was in his employ.

Willem François Maritz, an agent at Sutherland, said that Cohen told him he would pay all the other creditors but Stegmann, who should not have a penny. He told Stegmann what Cohen had said a day or two afterwards, before the petition in insolvency was presented. At the meeting of creditors he heard Cohen and Stegmann talking about 5s. in the £, but before that, in witness's office, Stegmann asked Cohen if he were still willing to pay him 5s. in the £. Cohen said no. In May witness attached £300 worth of goods in the suit of Stegmann v. Cohen, and that left only £20 worth of goods in the shop.

By Mr. Juta: He had bought the store occupied by Cohen, but he had taken no proceedings to oust Cohen. If Cohen were declared insolvent the place would come to witness at once. He was willing, however, that Cohen should continue in possession of the store if he could manage to pay the yearly rent of £325. If Van Eyk and witness could get hold of the store they intended commencing a mercantile business, but if they could find a good purchaser they would be willing to sell the place. When Cohen told witness he would not pay Stegmann, Cohen was in a great rage.

J. A. Stegmann, recalled at the request of the Court, stated that he remembered Maritz telling him Cohen did not intend to pay him. Before that time Cohen had made a similar statement to witness, before the petition in insolvency. He clearly understood from Cohen that he would not pay witness's account, and that was the reason why he presented the petition.

By Mr. Juta: He had said in the petition that Cohen told him, in the presence of witnesses, that he would not pay him, but as a matter of fact there were no witnesses present.

Counsel having addressed the Court,

The Chief Justice delivered judgment. He said that in regard to the first action, Stegmann v. Cohen, the Court was satisfied, as to the £901 13s. 3d., that there was no binding agreement by which the plaintiff had to wait a couple of years for his money, such an agreement being altogether inconsistent with the course of dealing and the evidence in the case. The £50 rent, and the £17 cart-hire appeared to be mere afterthoughts on the part of Cohen, and the Court would give judgment in the first case for the plaintiff with costs. In regard to the second action, Cohen v. Stegmann, that certainly ought to have been brought by way of claim in reconvention, and he did not understand why a separate action was brought and separate costs incurred. The case had satisfied him, more than any other, how careful the Court should be in applying the Act of 1884, and he must once more repeat that the Court would require the clearest proof of insolvency before an order would be granted, because he could well imagine that the Act might easily be abused by persons conspiring to produce general

insolvency which they were unable to prove. In the present case, if a minute inquiry were made nto the affairs of Mr. Cohen, he was not perfectly clear that there would be insolvency, but he was fully satisfied that the defendant Stegmann had good re son for believing that there was insolvency. Judgment in the second case would be for the defendant Stegmann, with costs.

[Stegmann's Attorneys, Messrs. Van Zyl & Buissinne; Cohen's Attorneys, Messrs. Tredgold McIntyre & Bisset.]

SUPREME COURT.

WEDNESDAY, JUNE 17.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

In re WALKER V. LIQUIDATOR CAPE CENTRAL RAILWAYS.

Costs—Counsels' fees—Taxation—Review—Cases.

Sir T. Upington, Q.C., moved for an order setting aside the reductions made in plaintiff's bill of costs by the Taxing Officer in respect of the fees paid to the counsel engaged in the case. Mr. Schreiner appeared for the defendant Company.

Counsel said the Court doubtless had every reason to remember the case of Walker vs. Liquidator Cape Central Railway heard only a few weeks ago. The applicant in the present matter was Mr. Buissinne, of the firm of Van Zyl & Buissinne, attorneys, Cape Town, who acted on behalf of Mr. Walker in the case he brought against the railway. The case was one of the most important ever heard in the Court, and the brief probably one of the heaviest. It was one of immense complication, and he hoped never to have to deal with such a one again; indeed he wished he had never had anything to say in it. The briefs of leading counsel on both sides were marked a hundred guineas, whilst those of junior counsel were marked seventy guineas. The taxing officer deducted fifty guineas off the fees of leading counsel, and thirty-five guineas off those of the juniors, and the applicant alleged that if this were confirmed, he would be a heavy loser. He (Sir Thomas Upington) had the greatest possible hatred of these things because there was an idea arising that members of the bar and side bar were anxious to take more money than they were entitled to; and he thought everyone would say so far as the bar of the country was concerned, that their fees were of the most moderate and reasonable character, and the bills of costs were taxed with great fairness to all parties. The present taxing officer was a gentleman who was as perfectly capable of dealing with the question as anybody that could be found, and he would ask the Court to decide once and for all whether the fees were not fair and legitimate.

Mr. Schreiner, on behalf of the Official Liquidator of the Company, said that he was quite willing to leave the matter in the hands of the Court.

Counsel referred their lordships to the cases mentioned by the Taxing Master in his report and to the principles involved in the same.

The following were the cases:—Edmeades v. Mostert, and Edmeades v. Scheepers. (*Cape Argus*, 14th July, 1882.)

The Chief Justice said . . . . "the case illustrated how necessary it was that the Taxing Master of the Court should exercise his judgment and discretion in regard to every item coming before him independently of any agreement or understanding, which might exist between the attorneys. He (the Chief Justice) said nothing here about the amount of Counsel's fees. He understood that the practice at all times was that this was a matter absolutely within the discretion of the Counsel himself. The Court had never interfered in the amount of Counsel's fees because if a Counsel was not satisfied with the fee marked on his brief he could at all times decline to take it. Counsel might say 'I am not sufficiently advised' unless he saw a fee of 1,000 guineas marked on his brief, and this could not be prevented. But it was a very different question when fees were to be charged against the opposite side." And in Swarts v. Landmark (*Cape Argus*, 18th August, 1882), "The general principle laid down was this—that the unsuccessful party should not be asked to pay more costs than was absolutely necessary for the decision of the case; and if the successful party desired to remunerate his counsel over and above what he could recover from the other side, let him do so, but the unsuccessful party must not be compelled to pay more than was necessary." In Spengler v. Sea and Green Point Municipality (*Cape Argus*, 14th July, 1883), "It was the duty of the State and the Bench to bring justice home to every man's door, but it should not be made in certain senses prohibitive." (After acknowledging the willingness of the Bar to come to the aid of paupers) His Lordship said: "But there were other people who, though not exactly without means, yet were not in a position to spend a large sum of money on taking their cases into Court, and the Court ought

to be careful not to encourage anything which would prevent that class of persons from obtaining justice." Beaufort West Municipality v. Merner (*Cape Times*, 1st September, 1882) ". . . . . the most recent decision on this point (the reduction of Counsel's fees) was in a case in which the fees of Queen's Counsel had been interfered with, and it was laid down by the Master of the Rolls that the rule was a most valuable one that the Court would not interfere with the decision of the Taxing Master with respect to Counsel's fees unless some grave mistake had been committed. He quite adopted the views of the Master of the Rolls, and as no grave mistake appeared to have been committed in this case, the review must be refused with costs."

The Chief Justice: I must confess that I was somewhat astonished at this fee, especially after the remarks made by the Court in previous cases. There was a time when, as between party and party, a fee of ten guineas would have been considered exceptionally high, and now an objection is raised to a fee of fifty guineas, which has been allowed as between party and party by the Taxing Officer. It is quite clear that as far as the personal feelings of the Court are concerned, we should be only too glad to see counsel well rewarded in every case in which they were engaged. It is for the interests of the public that the best talent in the country should be drawn to the Bar, and one of the means of doing that is the general knowledge that entering the Bar, leads, not only to fame, but also to fortune. But the Court cannot allow its personal or professional feelings to sway in a matter where the interests of the public are concerned. It is for the public interest that law costs should be kept as low as possible. I think in a country like England it has become a public scandal that litigation has become a luxury. The result has been that County Courts have been created, where the fees are much lower, and are gradually drawing away a great part of the fees from the Higher Courts of Law where the cases could be better dealt with. In this country also, the tendency also undoubtedly has been—at least since I have been on the Bench—that costs as between party and party are on the increase. For myself, I have always, even at the risk of perhaps giving offence to practitioners, thought it my duty to protect the public as much as I could. But still there is a tendency for costs to increase, and undoubtedly, costs at this moment are very much higher than they were some years ago. This may be partly owing to, no doubt, the general increase of wealth in the country, and the general status of living, but the fact remains. Now, as I said before, a fee of fifty guineas had been allowed by the Taxing Master. In my opinion, as between party and party, it is ample. I am by no means prepared to say that counsel would not have been justified in saying he would not take less than a hundred guineas, but it does not follow that the Court is bound to say that as between party and party, the other side should pay those costs. For these reasons I think this appeal ought to be dismissed with costs.

Mr. Justice Smith said that after the decisions in previous cases, he was astonished at the appeal being brought.

Mr. Justice Buchanan endorsed the principle laid down in the decisions in other cases. It appeared to him to be so sound that there was no reason to alter or medify it. The question was, was the Court to interfere with the Taxing Master unless some grave mistake had been committed? No such mistake had been committed, hence there was no need for interference.*

[Attorneys for the Appellant Messrs. Van Zyl & Buissinne—for the Respondent Company Messrs. Scanlen & Syfret.]

PETITION OF JACOBUS J. DU TOIT.

Ante-nuptial contract—Leave given to register although contract had not been tendered for registration within prescribed period.

Mr. Graham moved for an order to the Registrar of Deeds to register the ante-nuptial contract entered into by petitioner and one Anna C. du Toit, the said contract not having been tendered for registration within the prescribed time.

The order was granted.

IN THE ESTATE OF JACOBUS S. BOTHA.

Mr. Watermeyer moved for leave to the executrix to raise a loan on mortgage of the share of the farm Groot Rietvlei, situated in the district of Somerset East, belonging to the estate, for the purpose of satisfying certain debts.

The order was granted.

CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. TWENTYMAN.

Company—Bank in liquidation—Act 23 of 1861, section 13—Execution—Insolvent shareholder—Contributories—Past shareholders.

Sir T. Upington moved for leave to the official liquidators to issue a writ of execution against the

* I am indebted to Mr. J. H. Blenkin, of the *Cape Argus*, for the report of the argument and judgment in this case.—Ed.

respondent for the deficiency on calls payable on fifty shares registered in the name of Henry Heath, of which shares respondent was the former holder, or otherwise to place respondent's name on the list of contributories, as former proprietor of such shares.—Mr. Schreiner appeared for the respondent.

CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. WHITTON.

Sir T. Upington made a similar application in respect of the deficiency on seven shares registered in the name of Maurice Rabinowitz, of which respondent was the previous holder. Mr. Schreiner appeared for the respondent.

It was agreed to take the two cases together.

After argument,

The Chief Justice delivered judgment. He said that as to the first case the only question was whether the winding-up of the bank did as a fact amount to a process in the nature of an execution. In his opinion it did. If the winding-up did amount to a process of that character, it was a sufficient process to justify the liquidators in placing upon the list of contributories past shareholders as well as present, provided that the 18th section of the Act had been complied with, which had been done in the present case. The case was one in which the Court had to deal with a shareholder who was actually insolvent, and from whose estate a dividend was recovered. The dividend, however, was wholly insufficient to meet the call on these shares, and the application was to place upon the list the person who sold the shares to the insolvent. It was left for the Court to say who were contributories, and having regard to the paramount interest of the creditors, it was clear that the respondent should be placed upon the list of contributories, leaving it to the liquidators to pay out to past shareholders any funds available in the event of a surplus—which was improbable. In the second case, that of Whitton, the terms of the proviso were too clear, and the judgment of the Court would therefore be that in the first case the application would be granted, and in the second refused. In both cases costs would come out of the liquidation.

SUPREME COURT.

THURSDAY, JUNE 18.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

IN THE INSOLVENT ESTATE OF C. J. VILJOEN.

Insolvency—Trustee—Farms—Title-deeds—Mutual will—Præ-legacy—Vested interest of heirs.

Mr. Schreiner moved for an order requiring the insolvent to deliver up to the sole trustee of his estate the title deeds of certain farms in the district of Uitenhage registered in the name of the said Viljoen.

Sir T. Upington, Q.C., appeared for the respondent, and read respondent's affidavit that under the mutual will of himself and his late wife the farms, which the Court was asked to deliver up to the applicant, were given as a præ-legacy to the children of the marriage. He was led to understand that the trustee, the present applicant, desired possession of the farms in order to sell the property to satisfy the debts of respondent's estate, which would be contrary to the legal rights of the heirs under the mutual will. He was fully prepared to hand over the farms to the applicant on the condition that he would, as trustee, recognise the vested interest of the heirs, the children.

Mr. Schreiner said that the trustee was Mr. Harry Gibson, who deposed that he had no such intention as was attributed to him by the insolvent, but would deal with the property in a legal manner, and sell the half to which the insolvent was entitled. If the trustee did not do his duty the respondent clearly had his remedy at law, but he believed that if the Court granted this application there would be no further litigation, inasmuch as the trustee would do his duty.

Sir Thomas Upington said that what his client was afraid of was a sale in insolvency, which might be held by the Court to confer a good title to the lands. As a matter of fact the property was alienated, and the liquidation accounts filed, so far back as 1862. His client had all along been willing to lodge the deeds in the hands of the Master, pending the issue of a friendly action.

The Chief Justice, in giving judgment, said that the farms were registered in the name of the respondent, and the only person now entitled to the title deeds was the trustee. If the trustee attempted to deal illegally with the property the respondent, the insolvent, could protest, and even apply to the Court for protection against any

illegal act. It had not been shown, however, that the trustee had any illegal intention, and the order would therefore be granted as prayed.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Company—Bank in liquidation—Confirmation of accounts—Remuneration of Provisional Liquidators.

Mr. Schreiner moved for certain orders upon the third report of the official liquidators. He said that the report had been presented, and lain the usual time for inspection, and no objections were raised. The first application was for the adoption of the third report, and then the liquidators asked for confirmation of the accounts.

The Chief Justice: What has been paid out?

Mr. Schreiner: 12s. 6d. in the £, my lord. Counsel further moved for the fixing of the remuneration of the provisional liquidators. When the bank stopped payment four provisional liquidators were appointed, and he had now to ask for the fixing of the remuneration of three, Messrs. E. R. Syfret, J. Yeoman and W. A. Currey, the remaining one, Mr J. R. Reid, having since been appointed one of the official liquidators. These gentlemen held office for three days, during which £20,000 cash passed through their hands, and they carried out a great deal of important work, among the rest the opposition to an application to appoint separate liquidators for the Transvaal. The liquidators recommended an allowance of twenty-five guineas each to these three gentlemen.

The Court granted an order declaring the report adopted, confirming the accounts, and fixing twenty-five guineas each as the remuneration of Messrs. Syfret, Yeoman, and Currey.

LIEBENBERG V. VAN DER WESTHUIZEN.

Mr. Juta moved to make absolute the rule *nisi* for the attachment of the proceeds of a sale of goods belonging to the defendant, in satisfaction of a judgment in this Court in the suit between the parties.

The order was granted.

REGINA V. GILIOME SEN.

Cattle Diseases Act—No. 2 of 1881—Contravention — Horses —Glanders —Investigation Board—Isolation—Destruction

If the persons appointed under section 2 of the Act are of opinion that animals should be destroyed, they may have them destroyed themselves, or they may isolate them, but they cannot call upon the owner to destroy or isolate.

Mr. Schreiner apppeared for the appellant.

Mr. Giddy held a watching brief for the Crown.

This was an appeal from a sentence passed by the Assistant Resident Magistrate of Swellendam, under the provisions of the Cattle Diseases Act, 1881.

The case arose upon a summons issued at the instance of one Paul Dunn, who complained that two horses owned by the appellant were suffering from glanders, and that the appellant refused to isolate the said horses, although he was instructed to do so by members of the Investigation Board and by the Field-cornet of the district, as provided by the Act. The appellant was brought before the Magistrate on a private prosecution, found guilty, and was fined £10. Counsel submitted that no offence known to the law had been committed, and that no private person in the position of Dunn had any power to summon the appellant. The Act provided that any private prosecutor, such as Dunn, should have suffered real injury before he could appear before the Magistrate.

The Chief Justice, in giving judgment, said that the only question was whether it did amount to contravention to refuse to isolate these horses, after Giliome had been warned so to do by the persons appointed under the Act. As he had pointed out before, destruction was placed on the same footing as isolation by the Act, and therefore, if these gentlemen had ordered the appellant to destrey the horses, and he had not done so, he would be liable for having contravened the Act. In his opinion that was never intended by the Legislature. If the persons appointed under the second section were of opinion that the animals should be destroyed, they might have them destroyed themselves—which was a large power to give them—or they might isolate them, but they could not call upon the owner to destroy or isolate. They must do it at their own expense and risk. No doubt under the first section of the Act a person might be convicted if he had any animal infected with certain diseases, including glanders, but clear proof was required of the presence of the disease. Under the second section, however, it was only required that in the opinion of persons such as those who moved against this appellant animals were so infected. The present conviction could not stand, no offence having been committed. The conviction must therefore be quashed.

[Attorneys for the Appellant, Gus. Trollip; Attorneys for the Crown, Messrs. Reid & Nephew.]

PETITION OF CATHERINE J. M. TRUTER.

Mr. Watermeyer moved for a rule *nisi* calling upon petitioner's husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his malicious desertion.

A rule *nisi*, returnable on July 13, was granted.

STEYNSBURG MILL COMPANY.

Mr. Graham moved for an order placing the concern in liquidation under the Winding-up Act of 1868, and appointing an official liquidator with the usual powers.

The order was granted and Mr. W. F. Neeseman, of Steynsburg, appointed official liquidator; security of £500 to be given.

In re THE MINORS BOTHA.

Mr. Searle moved for the appointment of a *curator ad litem* to represent the minors in respect of the sub-division of certain shares in the farms Nooitgedacht and Groenfontein, situated in the district of Oudtshoorn.

The order was granted, and Mr. C. M. Lind appointed *curator ad litem*.

THE ESTATE OF THE LATE SAMODIEN.

Mr. Graham moved for an order to make absolute the rule *nisi* authorising the Registrar of Deeds to cancel certain mortgage bond passed by the said Samodien on the 26th July, 1846, in favour of George Apsey, hypothecating a piece of quit-rent land situated on the Wynberg Flats.

The order was granted.

PETITION OF M. J. VAN RENSBURG AND OTHERS.

Mr. Joubert moved to make absolute the rule *nisi* for authority to the Registrar of Deeds to correct certain errors in deeds of transfer relating to the farm Dassenklip, situated in the district of Swellendam.

The order was granted.

PETITION OF HENDRIKA C. DALY.

Mr. Graham moved to make absolute the rule *nisi* for authority to transfer to the executors of the estate of the late Michael Daly certain lot of ground, situated in the district of King William's Town.

The order was granted.

SAVINGS BANK V. DE BEER.

Mr. Graham moved for an order giving authority to the Sheriff to accept an offer made for the farm Hawden, situated in the district of Peddie, the offer being in excess of the reserve price fixed for the sale on the 13th December, 1889.

The order was granted.

IN THE ESTATE OF THE LATE MARY MARONEY.

Mr. Watermeyer moved for an order giving authority to the tutor dative of the minors interested in the estate to sell and transfer their shares of the landed property, of which the minors and two majors are joint heirs, on condition that the minors' portions be paid to the Master.

The matter was referred to the Master for inquiry.

IN THE MATTER OF TEENGS V. GARLICK.

Costs—Counsel's fee—Taxation—Review.

Mr. Searle appeared for the applicant, and Mr. Schreiner for the respondent.

This was a matter which came before the Court by way of review from a decision of the Taxing Officer regarding a case tried during the present term. The matter arose with reference to the employment of junior counsel in the case, and with respect to a legal consultation. The amount involved was £16 6s. 4d., of which £13 16s. 6d. was for counsel's fee and attorney's charges in the preparation of the brief, and £2 9s. 10d. in connection with the consultation. Counsel stated that the fee marked on the brief was five guineas, which had invariably been held to be reasonable by the Court. The Taxing Officer disallowed the amounts, on the ground that the facts of the case were brought before the Court in the action Levin v. Garlick (1 C.T.L.R., 25), which was before the Court three months ago.

Mr. Schreiner argued that the defence in the case of Teengs v. Garlick was exactly the same as in that of Levin v. Garlick, and the Taxing Officer took up the position that under the exceptional circumstances the course he had taken was justified.

The Chief Justice said that if the Taxing Officer had allowed the fees in the present case he was not prepared to say that the Court would have disallowed them, but a great deal must necessarily be left to the discretion of the Taxing Officer, who was in court when the case was tried, and knew all the circumstances. There were exceptional circumstances in the case which would prevent its being taken as a precedent, and that being so, the decision of the Taxing Officer would be upheld.

[Attorneys for the applicant, Messrs. Van Zyl & Buissinne; Attorneys for the respondent, C. C. de Villiers.]

SUPREME COURT.

FRIDAY, JUNE 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

CORONEL V. WARD AND WESSELS.—LAWRENCE V. WARD AND WESSELS.

Diamondiferous farm—Use—Agreement—Refusal of purchase—Cession—Assigns—Promissory note—Cancellation of Agreement—Exceptions.

Sir T. Upington Q.C., and Mr. Graham for the plaintiff; Mr. Searle for Wessels; and Messrs. Juta and Jones for Ward.

This was an argument on exceptions.

Mr. Searle said the exception taken by Wessels was this. That he excepted to the declaration in that admitting the facts therein alleged the same gave rise to no cause of action against him inasmuch as the rights of prospecting and of refusal granted to the defendant Ward were and are incapable of cession, assignment or transfer to any other person without his (the defendant's, Wessels) consent thereto so as to give such person any right of action against him (Wessels) and no such consent is in the declaration alleged. The declaration disclosed that the action was one brought against Ward and Wessels by Coronel for a declaration of rights under a certain agreement. The declaration set forth that the plaintiff Coronel was a broker residing at Kimberley. Wessels was a farmer, and Ward was a diamond-digger and speculator. Wessels was the owner of the farms Benauwdheidsfontein and Oliphantsfontein, and in October, 1887, Wessels gave Ward the right, on payment of £10,000, to use the farm, and at the same time it was agreed that Ward should have the refusal of the purchase of the farm for the sum of £200,000, to be paid in manner set forth in the agreement. On the 24th June, 1890, Ward agreed with Coronel whereby, in consideration of the payment by the latter of a sum of £2,500, he was to have a quarter-share in all rights and interests in the concession made by Wessels to Ward. It was further agreed between Coronel and Ward that the latter should prospect for diamonds on the farm, and the surplus over from the £2,500, if any, was to be divided between Coronel and Ward; also that a correct account should be kept of the expenditure. The declaration further stated that the plaintiff paid £500 down, and passed a promissory note for £2,000. Then came the paragraph on which the exception was really based. A notice of the agreement between Coronel and Ward was duly sent to Wessels; but Ward now claimed that the agreement was cancelled, on the ground that the £2,000 was not paid on the due date; and he further refused to give proper information regarding the development of the mine. There was also an agreement that, on receipt of the sum of £175,000, Wessels should hand over to Ward the said farms, and that Ward should tranafer certain of his rights to the plaintiff.

Sir T. Upington said it was clear that, when these cases came on for trial, the plaintiffs must be prepared to lodge in court or tender to Wessels, in case Ward did not do so, the money required. Wessels had given rights to Ward or his assigns. If, on the 30th June, Ward was not prepared to pay this money to Wessels, the plaintiffs would be entitled to have the agreement carried out. The plaintiffs could not enforce their rights until this £175,000 was paid, and if they could not pay it, they would lose all their rights. Their prayer was that it might be declared that the agreement was binding on Ward, and that Wessels was bound to transfer these farms to Ward on receipt of the sum of £175,000. Surely this was a fair thing to ask of the Court, and would not put Wessels in any difficulty at all.

After further argument,

The Chief Justice said it was very desirable that the Court should decide on the exception raised on behalf of Wessels. In his opinion, inasmuch as in the agreement entered into between Ward and Wessels the assigns of Ward were mentioned, he (Ward) would be entitled to cede his rights to a third person, and the cessionary would have the same rights as Ward would have as against Wessels. In his opinion the exception must be overruled with costs.

Mr. Juta said in the case of Coronel v. Ward and Wessels. The defendant Ward excepted to the right of the plaintiff to sue and to have and maintain this action inasmuch as the plaintiff had ceded and transferred all his right, title and interest in the Agreement of the 24th January, 1890, entered into between him and the said defendant to the official liquidators of the Cape of Good Hope Bank (in liquidation). Coronel was indebted to the bank in the sum of £40,000, and the bank held shares to the value of £8,500 as security,

The Chief Justice said the bank might perhaps be made a party to the suit.

Mr. Juta had no objection to the bank being joined in the case.

Sir T. Upington said that Coronel had a right to sue in his own name, as he had not made a cession of his whole right and interests to the bank. He was quite willing that the bank should be joined either as plaintiff or defendant,

The Chief Justice said in some cases a power of attorney was given to the cessionary to sue, and if there had been such a power of attorney in this case, there would have been no objection to Coronel being the sole plaintiff. The cession appeared to him to be an out-and-out one, and every right as against Wessels enjoyed by Coronel had been ceded to the bank. He thought the proper party to sue was the bank, and the exception must be allowed, with costs. He did not think any additional costs need be incurred. He was of opinion that the bank should nominally be made co plaintiff, but the same counsel now engaged could be employed. The exception must be allowed, with costs.

LISCHTLY V. STRANGMANN.

Commission—Sale of horse—Action—Decision of Resident Magistrate—Appeal.

Mr. Schreiner for appellant; Mr. Searle for respondent. This was an appeal from a decision of the Resident Magistrate of Worcester, in a case in which appellant claimed £5 as commission for effecting the sale of a certain draught stallion, named Osman Pasha, to one Mr. W. van der Vyver, of Stuk River, Robertson district, for the sum of £100. The Magistrate decided against the appellant, on the grounds that there was nothing in the evidence to show that the plaintiff took part in effecting the sale which the defendant concluded beyond introducing the parties. From this decision the plaintiff now appealed. After argument, the Chief Justice said that Mr. Schreiner had admitted that there was evidence in support of the Magistrate's decision. The appellant had been promised a commission if he found a purchaser for the horse for £120. If he (the appellant) had been a licensed broker he would have had an implied contract, and even if he did not find a purchaser at the sum named he would have a claim for commission, but no such contract could be implied in a dealing between a general dealer and a miller. It was agreed between the parties that £5 should be paid to the appellant if he succeeded in getting £120 for the horse, but he was unsuccessful, and therefore was not entitled to anything. If the appellant had been out of pocket in connection with the matter, he might have recovered something, but there was no proof that such was the case. He had been offered £1 10s, which was no doubt an admission of liability by the respondent, but the appellant declined to accept it. In his opinion the Magistrate was right, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, C. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

JONES V. CAUVIN AND CO.

Costs — Demand — Rule 312 — Practice — Appeal.

Mr. Searle appeared for the appellant, and Mr. Schreiner for the respondents.

This was an appeal from a decision of the Resident Magistrate of Cape Town on a question of costs. The respondents (the plaintiffs in the Court below) sued the appellant (the defendant in the Court below) for the sum of £2 7s., the price of certain goods sold to the defendant, including interest and collection. On receipt of the summons the defendant tendered the amount of his account, less the costs of the summons. This, however, the plaintiffs refused to accept. At the hearing of the case the defendant admitted the debt, but alleged that no demand had been made until issue of the summons, and submitted that under these circumstances he could not be held liable for costs. It was proved at the trial that notice had been sent to the defendant. The Magistrate gave judgment for the plaintiffs with costs, on the grounds that no demand was necessary, as all purchases, according to the conditions of sale, were for cash, and even if a demand were necessary, the sending of the notice and calling were sufficient. From this decision the defendant (appellant) now appealed.

Mr. Searle, in support of the appeal, contended that the Magistrate had erred in holding that no demand was necessary as the purchases were for cash. There was no proof that Mr. Jones had received the notice or any demand prior to the summons. Counsel directed the attention of the Court to the following cases: Hepworth v. Dunkley (3 Juta, 400), Redlinghuys & Wessels v. Jones, Cosnett & Ball (3 Juta, 250), Lesar v. Morrison (1 Juta, 30), and 312th Rule of Court, and submitted that under all the circumstances of the case the appellant ought not to have been held liable for costs.

The Court, without calling upon Mr. Schreiner, delivered judgment.

The Chief Justice said that they were of opinion that the appeal ought to be dismissed, on the simple grounds that the Magistrate had found that notice had been sent to the defendant. The plaintiffs' clerk swore that he had posted the notice to the defendant, and as he had not been cross-

examined on this point, there was virtually no denial. The plaintiffs had done their duty in sending the notice, and they were not to be put to the necessity of proving that the defendant had actually received the notice. Under these circumstances the appeal would be dismissed, with costs in this Court and in the Court below.

[Appellant's Attorney, J. Hamilton-Walker; Respondents' Attorneys, C. C. Silberbauer.]

BOONZAIER V. CASTENS.

Slander — Action for damages — Case dismissed — Appeal — Assistant Resident Magistrate's judgment reversed.

Mr. Schreiner appeared for the appellant; the respondent in default.

This was an appeal from a decision of the Assistant Resident Magistrate of Clanwilliam. The appellant (the plaintiff in the Court below), Miss Hester Helena Boonzaier, sued the defendant (respondent) for £20 damages, alleged to have been sustained by reason of his having spread a false and defamatory report about her to the effect that she had been delivered of a child. The Assistant Resident Magistrate dismissed the case on the grounds that no special damage had been proved. From this decision the appellant now appealed.

Mr. Schreiner, in support of the appeal, remarked that the Assistant Resident Magistrate had clearly erred, as it was a very elementary principle of our law that in cases of this kind it was not necessary to prove special damage.

The Court reversed the decision of the Assistant Resident Magistrate, and gave judgment for the appellant for £5 damages, with costs in this Court and in the Court below.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

TUESDAY, JUNE 23.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

EXECUTORS MARY QUIN V. EXECUTOR JOHN QUIN.

Mr. Schreiner moved for re-consideration of defendant's application for the appointment of a commission to take his evidence at Johannesburg.

Sir T. Upington, Q.C., appeared for the respondent.

The Court granted an order for the taking of evidence on commission as prayed, and appointed Mr. J. G. Auret, barrister-at-law, of Johannesburg as commissioner.

PETITION OF DAVID KNOX.

Mr. Castens moved for leave to sue by edictal citation in an action against petitioner's wife for restitution of conjugal rights.

The Court granted leave to sue by edictal citation, returnable on the 20th November, personal service if possible, failing which one publication in the *Scotsman* and one in the *Daily Telegraph*.

WATSON'S EXECUTORS V. WATSON.

Sir T. Upington, Q.C., appeared for Mr. W. A. Currey, one of the executors in the estate of the late Thomas Watson, and moved for an order requiring the respondent to join in an action about to be instituted against the heirs of the estate of the late Thomas Watson, to recover from them the amount of call on fifty shares in the Union Bank registered in the name of the said estate.

Mr. Schreiner appeared for Mr. H. F. Watson.

The Court authorised the applicant, Mr. Currey, to bring an action without the intervention of his co-executor, Mr. Watson, the respondent to intervene as co-defendant. Costs to be costs in the cause.

PETITION OF THE SOUTH AFRICAN LOAN AND MORTGAGE AGENCY.

Mr. Tredgold moved for leave to sue by edictal citation, in an action against one Christian H. J. Bruhns, for recovery of a sum of money due under a mortgage bond.

The Court granted the order as prayed, citation returnable on the first day of next term.

PETITION OF EMMA WOODMAN.

Mr. Graham moved for leave to sue *in forma pauperis* in an action for damages against one J. B. Robinson.

The matter was referred to counsel for inquiry.

CORONEL V. WARD AND WESSELS, AND LAWRENCE V. WARD AND WESSELS.

Sir T. Upington, Q.C., Mr. Solomon, Q.C., and Mr. T. L. Graham appeared for the plaintiffs; Mr. Juta and Mr. Jones for Ward, and Mr. Searle for Wessels.

The two cases were taken together by consent of the parties.

Sir T. Upington, in opening the case, said that a good many of the facts of the case had been under the consideration of the Court in connection with certain exceptions which were very recently heard. The case at first sight appeared to be of a somewhat complicated nature, mainly arising from the number of documents that were necessary to be referred to in connection with it, and the amount in dispute was of course of considerable magnitude, but he thought that if the Court would allow him to refer to the documents a little more in detail than was usually the case he should be able to reduce the issues to very simple points. It appeared that by an agreement which was entered into by Mr. Wessels, sen., who resided at Wellington, on the 28th October, 1887, Mr. Wessels agreed that Mr. Ward, his co-defendant in the present suit, who resided at Beaconsfield, should have the refusal of certain farms (Oliphantsfontein and Benauwdhoutfontein) in Griqualand West for a period of twelve months from November, 1887. The purchase price of the farms was fixed at £200,000. It was provided that during the twelve months Ward had the refusal of the farms he should have the sole and absolute right to prospect and search for diamonds or other precious stones upon the farms, and develope any mine or mines he might discover on the farms. By an agreement entered into on the 18th of October, 1888, the period for exercising the option of purchase was extended until the 1st of May, 1889. By a further agreement, entered into on the 9th February, 1889, the time was extended to the 1st February, 1890. It was provided that Ward should pass his promissory note for £5,000 for such further extension from May 1, 1889, and that in case the money was not paid the agreement should be considered at an end. Subsequently, on the 25th of October, 1889, the period for refusal was extended to the 30th of September, 1890, and a further and final agreement was entered into on January 10, 1890. That was an agreement by which Mr. Wessels agreed to a further extension of eighteen months, to the 1st of July, 1891. It was agreed that Wessels should cancel all previous notes and agreements, and that Ward should pay for the further extension £3,000 cash and £2,000 by way of promissory notes payable in July, 1890. An agreement was formally drawn up on January 24, 1890, by which the defendant Ward agreed in writing with the plaintiff Lawrence whereby, in consideration of Lawrence paying £2,500 to Ward, he ceded to him one-fouth share in the rights and privileges he had then, he having already ceded one-fourth share to one Coronel. The answer Ward gave to that part of the case was that, as to the payment of £2,500 and the previous cession to Coronel, he denied those facts. In the agreement between Ward and Lawrence the sale to Coronel was recognised. That was Lawrence's case, in respect to which Ward replied that by the terms of an agreement of the 10th January, 1890, he was to pay to Wessels £10,000 by the 16th January. Ward was unable to pay the money, and as a result of negotiations entered into with the plaintiffs it was agreed that they should receive each one-fourth share in the whole of the rights possessed by Ward in consideration of the payment of £5,000. Coronel and Lawrence were each to pay £1,500 in cash, and the other £2,000 at a date which was fixed in the month of July, 1890, Coronel agreeing to pay the £2,000 in full, and signing a note to that effect. The allegation on the defendants' pleadings set out that the note fell due on the 16th July, 1890, and was renewed, but that on the date fixed in the renewal bill Ward was unable to meet it, whereupon Wessels declined to renew further, and the agreement between Wessels and Ward was accordingly cancelled by consent. The issues which appeared to him to be raised were these: In the first place, it being clear that as far as Lawrence was concerned he entered into an agreement and paid £2,500, could any case be set against Lawrence which was not based upon his contract; secondly, did Lawrence or did he not pay £2,500; thirdly, if he did, had anything subsequently occurred which was due notice to Wessels that Lawrence was a party to this agreement; fourthly, if so, had Wessels any right whatever to cancel this contract upon Ward's failure; and fifthly, did he so cancel it?

Evidence was then called.

The plaintiff, William Lawrence, examined by Sir T. Upington, said that he now resided in Pretoria, where he was manager of the Transvaal Loan and Mortgage Company. In December, 1889, and for some time subsequently, he was manager in Kimberley of the Cape of Good Hope Bank. He remembered that in December, 1889, Ward spoke to him outside the bank with regard to the Wesselton property, of which witness knew he held the refusal. He informed witness then that his term would expire on the 31st December, and said he wished to raise £5,000 to get an extension of the refusal for another nine months. The result of the matter was that he discussed the whole thing with Mr. Coronel. Subsequently, he entered into an agreement with Ward, on the 24th January, 1890. He had not seen anything, in the intervening period, of Mr. Marais, the general agent of Mr. Wessels. An arrangement was made to meet Mr. Marais, but before that took place Mr. Coronel said he would like to look over the property, and they all drove over it one Saturday afternoon, Coronel and Ward meeting at the latter's house. Under the agreement the sum of £2,500 was to be paid by witness, and was paid in full, in terms of the contract. He knew nothing of any collateral

agreement, nor of any other agreement save the one of January 24, 1890. He had signed no other agreement. His liability finished when he paid his money, and had no liability whatever upon Coronel's promissory note. In addition to the £2,500, he paid £3 per month as his *pro rata* share of the rent of certain machinery on the mine, and also £25 to Mr. Goodchild, also as a *pro rata* share of the fee for making a valuation. Coronel also paid £25 to Goodchild. After the agreement was signed he called upon Mr. Marais, the general agent of Mr. Wessels, at his house upon the property. That was at the commencement of February, 1890, and when the call was made the agreement between himself and Ward and Coronel was discussed. He said to Marais that he supposed the latter knew that himself and Coronel had an interest in the property with Ward, and Marais said yes, that he knew all about it. He then asked Marais for the diagrams of the property, and Marais said he had not got them. Witness subsequently found that the diagrams were at Bloemfontein, from which place he got copies. Marais asked witness what the parties to the agreement were going to do with the property, whereupon witness replied that it was intended to work the Oliphantsfontein mine. Soon afterwards work was started under the supervision of Ward, and witness went down and stayed on the property seven or eight days, in order to form an opinion as to the worth of the property. Witness left Kimberley on the 18th of June, 1890, for Pretoria, where he had been since. When he left Ward was ill, and work on the mine had practically ceased. Witness had before that made some efforts to dispose of the property in London. Before leaving he called on Ward, and asked him from time to time to inform witness of how things were going on, and he promised to do so. He was not made aware, until October, 1890, that Coronel had obtained any renewal of his note, and never had felt or accepted the slightest responsibility upon Coronel's note. Since the time of his leaving Kimberley he had never been informed by Ward of the finding of any diamonds in the mine.

Cross-examined by Mr. Juta; Coronel had a large account at the bank of which witness was manager. He introduced Coronel to Ward, and he and Coronel agreed to raise £5,000 on condition that each received one quarter-share in the rights of Ward. The bank was to advance Coronel a sum of money upon his account, and then the question arose as to whether Marais would take £3,000 in cash and £2,000 in a note by Coronel. He had nothing to do with that personally. It was a matter between Coronel and Ward, but he knew it was being done. The De Beer's Company had a large account at the Cape of Good Hope Bank. He was not aware that he could not appear publicly in the transaction. He was not aware that if De Beer's had become aware that he was interested in another diamond-mine he would have been hauled over the coals, or that De Beer's would in such an event have withdrawn their large account. That could not have weighed with him under any circumstances, because at that time he was going to leave the Cape of Good Hope Bank. He was not aware that in Coronel's agreement there was no mention of his (witness's) name. If Mr. Ward were to say that his name was kept out purposely he would deny it. If Mr. Ward swore that the promissory note was signed by Coronel simply to keep out witness's name from the transaction, he would swear that was not the case. He had nothing whatever to do with Coronel's promissory note, which was no obligation of his. As manager of the bank, witness allowed Coronel to overdraw his account. The £3,000 was paid to Ward when the bank allowed the overdraft. The £3,000 cash and the £2,000 on the promissory note represented the £5,000 which he and Coronel agreed to pay for two fourth-shares of Ward's rights in the mine. He paid Coronel his £1,500 on January 24, 1890, by cheque. He had not yet paid the remaining £1,000, but Coronel had a private arrangement of his own with Ward. Ward had received witness's full share of £2,500, witness having borrowed £1,000 from Coronel in order to complete the payment. He borrowed the £1,000 from Coronel on January 16, 1890. There was only a verbal arrangement, and Ward was not present when it was made. Witness arranged it in the Kimberley Club. Coronel then agreed to make up the full amount due from witness, who was to have no liability on the promissory note. If Coronel said he was liable on the note he would state that it was not so. On the 26th of June, 1890, he wrote to Ward stating that as he had not sold his interest he could not pay anything to Marais, but he thought Coronel should get the bill held over for a time. Ward wrote him a letter dated the 30th June, but he could not produce it. He believed it had been destroyed. He could not say what the letter was about. He could not say if Ward in the letter asked him to provide for the bill, but such might have been the case. About that time he wrote to Ward that he would not take less than £4,000 for his share. He knew that Coronel's bill fell due in July, and he had been communicated with by Ward on the subject, but he did not reply to Ward, although he could then have paid £1,000. If Coronel had then asked him for the money he should have paid it. Ward wrote him on the 15th of September to the effect that unless the bill for £2,000 was met when it fell due—a renewal having been obtained—Wessels would not renew again. In October Ward wrote him that unless the bill signed by Coronel was met by the 15th of that

month he should hold him liable, and cancel, to all intents and purposes, the agreement in which witness was interested. To that letter he sent no answer, although he was then in a position to pay the £1,000. He did not even communicate with Coronel on the matter, and he never communicated with Ward until the Wesselton Mine was discovered. Ward had given him to understand that the agreement in which he was interested was forfeited, but he took no notice, knowing that Ward could not forfeit it. It was never agreed that witness and Coronel, or witness alone, should advance £1,000 for the working expenses of the mine. Ward was to work the mine. The raising of the money was Ward's business, not his. Ward told him that he had simply to work the mine, and it would pay itself as he went along. Ward banked with the Cape of Good Hope Bank, where his account was overdrawn, but he had securities against the overdraft. He had heard that Ward possessed a lien on certain claims in the Du Toit's Pan Mine, but it was never agreed that upon the security of those claims witness should advance £1,000 for working expenses of the mine. Ward informed him that the Mining Board owed him a sum of money upon an action, and that he was waiting for that in order to work the mine. In the meantime, however, it was not agreed that witness should advance any money for working expenses. He did not answer Ward's letters of September and October, for the reason that he never for one moment recognised any liability upon Coronel's promissory note. He took legal opinion in Pretoria, and was quite content to rest upon his contract. The agreement with Coronel was that the latter should ask witness for the money, and if Coronel had asked for the money in September last witness could easily have paid it, and would have done. He knew that Coronel had not paid Ward the £2,000, and yet, knowing that, he did not choose to communicate with Coronel. On the 14th January, 1891, having heard of the discovery of the Wesselton Mine, he wrote to Ward asking him to put the property in his hands for sale. In February, Ward wrote to him that the agreement in which witness was interested had become null and void. Witness had sold his interest in the mine for £5,000, of which he had received £2,500, and was to receive £2,500 more when that case was over. He had sold to a Mr. Imroth, in February this year, and Mr. Imroth was paying all legal charges in connection with witness's interest. The sale to Imroth had been due to a suggestion by Coronel.

Cross-examined by Mr. Searle: He only met Mr. Marais once. His memory was not at fault about the date, which was long before June, 1890. He knew that because he left Kimberley in June, and he saw Marais long before he left Kimberley. Marais was mistaken; if he said the interview only lasted five minutes he was wrong. It lasted fifteen or twenty minutes. He saw Marais in February. He did not assume when he saw Marais that the latter knew nothing of the agreement to which witness was a party, for the simple reason that he knew Marais knew all about it. He knew that because Coronel told him, not of his own knowledge. He did not know as a fact that Marais never transacted any important business without consulting Wessels. He knew that Marais and Ward went down to Wellington to get from Wessels an extension of time, in which witness was to have an interest. He never communicated with Marais or Wessels after the interview with the latter on the farm. He did not suppose that Mr. Wessels was going to let the refusal run on for ever and ever. He knew that by a certain time a certain sum had to be paid. That money was not paid, but he took no action. It was not that he let the thing slide. He simply rested on his contract, and was satisfied with his position. He had heard since that other people claimed an interest in the property.

Re-examined by Sir T. Upington: Coronel and he paid £25 between them as a share of the expenses of the journey of Marais and Ward to see Wessels at Wellington. When the promissory note fell due the only notice he received was in the shape of the letter from Ward.

Mr. Searle: Mr. Ward handed to Mr. Marais a promissory note signed by Coronel and endorsed by Ward.

The plaintiff, Solomon Hyam Coronel, examined by Mr. Solomon, Q.C., deposed that he was a broker living at Johannesburg, but in December, 1889, resided in Kimberley. He was a customer at the Cape of Good Hope Bank, where he kept a large account. He remembered that in January, 1890, Lawrence spoke to him about the Wesselton property, and Ward afterwards came and spoke to him on the subject. Afterwards, at Ward's request, he met Marais at Ward's house. When Ward had explained the matter to him he said that the further refusal for nine months was too little, and that it should be got for two years. He also said that the purchase price of £200,000 was unduly large, and should be lowered to £150,000. Ward agreed to let Lawrence and witness each have a quarter-share in the property for £5,000. As the result of negotiations with Marais, the latter agreed to an extension of time for eighteen months, and that the purchase price should be £175,000. The first arrangement was that Lawrence and he should pay £2,000 cash and £3,000 on a note, but Ward was not satisfied with that, and in the end Lawrence and he agreed to pay £3,000 cash and £2,000 on a note, and he was almost sure that when Ward was handed the £3,000 in witness's office Marais was also present. That was on the 16th January, 1890,

but he did not go and inspect the property then. The note for £2,000 fell due in July, 1890, and was then renewed for £2,080, with interest at 6 per cent Afterwards Ward asked him for the money, and he promised to try and find it, but at the same time stuck to it that his right did not expire till July, 1891. In the end witness did not meet the bill. In November, 1890, when a diamond was discovered on what was now the Wesselton Mine, he went to Ward and said that it was strange he had not been told of the find. Ward then replied that witness was out of the thing altogether, because he had not paid the note for £2,000 which he had signed. Witness said that was very hard, whereupon Ward replied that witness could "stand in" a quarter of his (Ward's) share. Witness said he did not want that, but would maintain his own interest in the mine. He never for one moment agreed to cancel the agreement. When he went to Johannesburg, he asked Ward to keep him posted how things were going, and he promised to do se, but did not. It was arranged between himself and Lawrence that witness should pay £2,500 in full settlement for Lawrence's quarter-share. Afterwards witness ceded his right in the mine to the liquidators of the Cape of Good Hope Bank, to which institution he was a debtor for £40,000. When Ward heard of that, he said witness should have gone to him, and he would have given him more than £40,000 for his share.

Witness, cross-examined by Mr. Juta, stated that Mr. Lawrence, late manager of the Kimberley branch of the Cape of Good Hope Bank, advanced £3,000 of the bank's money to his (witness's) account. He could not tell why Lawrence's name did not appear in the agreement. He did not remember telling Mr. Lipp that Lawrence was liable for half the amount of the promissory note. He never spoke to Armstrong on the subject. He knew that if the note was not met when it became due the concession would lapse. Armstrong never came to him about the matter. He knew that Armstrong was working with Vizettelly. He did not remember asking Armstrong, after the latter's return from England, how the flotation was getting on. He tried to get Mr. Lipp to advance the £2,000 and take his (witness's) interest in the concession. After he had compromised with the liquidators of the Cape of Good Hope Bank Ward told him that he would have given him £40,000 for his share. He left for the Transvaal early in December last, and in February he communicated with the bank.

Cross-examined by Mr. Searle: He saw Marais in December and remembered a conversation between Marais, Ward, and himself about renewing the promissory note. He (witness) first suggested the purchase price of £175,000. He did not remember Ward saying that if the matter went through Wessels would reduce the price by £25,000. He saw Marais again, but did not know if he had gone down to see Wessels. He received a notice that the note had been protested, but he did not remember Marais telling him that Wessels only knew Ward in the matter of the concession.

By the Court: Neither Ward nor Marais ever told him that if the matter fell through he would get back his money.

Mr. William Wells, examined by Mr. Solomon, Q.C., stated that he had known Mr. Ward for the past eight or nine years. He remembered a conversation which took place between himself and Ward in February last. Ward asked him to wire to Lawrence for the refusal of his share in the concession. Witness told Ward that there was no use in doing so, as Lawrence had already given the refusal.

Cross-examined: He could not remember the exact date of the conversation, but he was certain as to its substance.

Sir T. Upington, Q.C., then read the correspondence, and closed the plaintiffs' case.

Mr. Ward, examined by Mr. Juta, stated that in January, 1890, £5,000 was to have been paid to Wessels. He was introduced to Coronel by Lawrence. He subsequently had a conversation with Coronel about the concession, and the latter said that if Lawrence advanced £1,000 he (Coronel) would stand in too. Lawrence's name was not mentioned in the agreements, because the De Beer's Company kept their account in the Cape of Good Hope Bank, and if it were known that the manager was interested in outside matters he would probably lose his post. Coronel was to give a promissory note for £2,000, so that Lawrence's name should be kept out of the transaction. Lawrence instructed the attorneys to draw up the agreements. When the note was coming due he wrote to Coronel, telling him that if it were not met the concession would lapse. In consequence of a conversation which he had with Mr. Lipp, he came down to Cape Town and saw the liquidators of the Cape of Good Hope Bank, but they refused to advance him the £2,000, After his return to Kimberley he saw Mr. Marais. and told him that he (witness) would be able to get the £2,000. Marais then told him that he was too late, as the concession had lapsed, and that Mr. Haarhoff had been to him with an offer from the De Beer's Company. Mr. Marais, however, subsequently told him that if the purchase price was increased, he (witness) might be able to get a new concession from Wessels.

Witness's examination had not concluded when the Court rose.

SUPREME COURT.

WEDNESDAY, JUNE 24.

Before the Chief Justice (Sir J. H. DE VILLIERS) Mr. Justice SMITH, and Mr. Justice BUCHANAN.

CORONEL V. WARD AND WESSELS, AND LAWRENCE V. WARD AND WESSELS.

The hearing of this case was resumed. The plaintiffs were represented by Sir T. Upington, Q.C., Mr. Solomon, Q.C, and Mr. T. L. Graham; the defendant Ward by Mr. Juta and Mr. Jones; and the defendant Wessels by Mr. Searle.

The defendant Ward's examination, continued by Mr. Juta: Before the meeting with Marais he had made several endeavours to get the money, and had offered an eighth of the whole concession for £2,000. He had approached the Messrs. Armstrong and a Mr. Cross, the latter of whom promised him £2,000, but did not send it. Later he offered the whole concession for £2,000, with the exception of a small interest for himself. He did that because he thought he should lose the concession unless he got the £2,000. After the interview with Marais he made certain offers. Between April and November he was very ill, his life being several times despaired of. He never left the house from April to the end of October. In December, 1890, a new memorandum was drawn up, by which the purchase price of the mine should be £200,000. He did not acquaint Coronel or Lawrence with that fact. He considered they were out of the whole thing. Marais said at the time that he could not grant an extension without consulting Wessels. In January Mr. Peter Wessels, son of the defendant Wessels, came to Kimberley, and on the 12th January Marais wrote to him that he would accept the renewal of his promissory note until March, the purchase price of the mine to be £200,000 instead of £175,000. Soon after he went to see Mr. J. J. Wessels, with Marais. An interview took place, at which the members of the Wessels family were present. Wessels said that unless witness could give him more money the concession would end. He wanted half of whatever profit witness made out of the mine. The result was that he was to pay £300,000 for the farm. When he handed his own promisory note he got that of Coronel's back again. If he had not entered into the fresh agreement, the whole concession would have been lost. He meant by that that Mr. Wessels would have compelled him to give it up. He had no choice in the matter. The Wessels had a high opinion of the mine, which they thought was worth a million of money. He knew that if he could gain time he could develop the mine and make more money out of it. Afterwards he saw Coronel, but it was untrue that he ever told Coronel he would give him £40,000 for his share. He had not at that time forty pence. Everyone was suing him, especially certain people. The idea that he offered Coronel £40,000 was simply ridiculous. He would have had to give £40,000 for the £2,000 if Marais had pressed him for the cash at once. He never mentioned £40,000 to Coronel. He had heard the evidence of Wells. He was passing by the door with some diamonds from the Premier Mine. Wells said that Imroth had purchased the share of Lawrence, and witness replied that he had heard something to that effect. Coronel was present when some money was negotiated for Marais, and said nothing at all about any interest he held. As far as possible, he endeavoured to keep back from everybody the fact that Coronel had an interest in the mine at all. He did not know if Marais knew that Coronel and Lawrence had a share in the mine. In September he wrote to Lawrence asking him to raise £200 or £300, but that was in order to work a small mine in the Free State. There was a mistake with regard to names. The small mine in the Free State was the Wesselton Mine, and the mine where recently the rich finds were made was the Premier Mine. Whilst he was ill he sent Marais to Coronel for money, but the latter did not seem anxious to meet him and said he had no money.

By Mr. Searle: Mr. Marais came to him in October, when the bill was maturing. When he came back and said Coronel had not the money, Marais told witness he would lose his concession. It was then arranged that witness should have an extension till December. That was because Cross was in London, and had promised to send witness £2,000. Marais after that came every Monday morning for the money. He expected the money from Cross up to January. On one occasion he sent Lawrence to Marais for diagrams of the property. That was the only time, as far as he knew, that Lawrence and Marais met. Coronel, Lawrence, and himself were never together on any one occasion. In witness's presence, Coronel never said to Marais that he had an interest in the mine.

By Sir T. Upington: The £175,000 agreement was considered as cancelled when the bill of Coronel was not paid. He had no writing from Marais to prove the cancellation of the agreement. There was no necessity for such writing, the cancellation having been verbal. There was no document showing the extension of time from October, 1890, to December, 1890, the arrangement with Marais having been verbal. He meant to say that when he received a letter from Marais, in January, 1891, the agreement to July, 1891, had been cancelled. He first went into occu-

pation of the land upon which the mines were in 1886 or 1887. During the whole of the time except when he was ill, he continued working at the mine. When he was ill Coronel and Lawrence promised to pay the wages of a man to look after the mine, but they paid one week and then stopped. After November, 1890, he gave out four concessions to the Armstrongs, Clarkson and Kimball, and Roussouw and Wallater. Those concessions would end at the close of the present month. From January 20 to June 19, 1891, he gave the right of prospecting to Capriscus, the prospector who found the mine. He decidedly differed from Coronel when he said that Marais, Coronel, and himself ever discussed the latter's interest in the mine. Marais took down no terms in writing. The expression, "taken down by Mr. Marais," meant that Marais took down the conditions to Wessels at Wellington. There was a considerable correspondence with Vizetelly in London, and Lawrence assisted in carrying on that correspondence under witness's dictation during the time of his illness. The only thing Marais knew was that Lawrence and Coronel were assisting witness to find the money. The terms upon which that money was found was witness's business, not Marais'. He admitted that when he saw Wells and the latter referred to Lawrence's claim he did not at once deny that any such claim existed. He could give no reason why he did not deny it, but he did not. The meeting between Marais and Coronel was simply a matter of introduction. He had to introduce Coronel to Marais, but they did not discuss matters at all. He simply said to Marais that Lawrence and Coronel were helping him with money, but he was not sure if Lawrence was specifically mentioned by name. The introduction took place in witness's house, and its only object was to show Marais that there was really a person in existence who would lend him the money. At one time he offered the whole concession for £2,000, providing a sixth of the profits were given him. When he met Lloyd the latter knew that Lawrence had to find the money he owed. He offered an agreement to Lloyd, which he had no objection to show to the Chief Justice, but he would not show it to counsel in the present delicate state of affairs. He saw Lipp, the manager of the Kimberley branch of the Cape of Good Hope Bank, in November last about the business. In February, 1891, the business was introduced to Colonel North, but he answered that he was only dealing in nitrates. The people in Europe did not refuse to take up the property unless there was an extension of time. At the time of the agreement with Lloyd the agreement with Wessels had not been cancelled. Diamonds had been found at the mine. He had disposed of some, but had rendered no account to either Lawrence or Coronel. He had kept an account, however. The mine was not so payable, he had said upon oath, as Bultfontein or Du Toit's Pan, but money could be made out of it.

Re-examined by Mr. Juta: The extension from October to December, 1890, had been purely by the kindness of Marais, witness then expecting money from Cross. Marais knew perfectly well that witness did not want to lose the concession. There had been constant renewals of the £5,000 since 1886 or 1887.

By Mr. Searle: Marais did not know that Coronel and Lawrence helped to pay the expenses of the journey to Wellington. It was not likely that he was going to let Marais know of his poverty. No conditions were ever taken down in writing before Marais.

By the Court: The agreement of the 10th February, 1891, was in force if witness paid his promissory note on June 30. There was a former document in existence, by which, unless witness paid the £2,000 by March 31, 1891, the concession ceased, but that document was cancelled by the agreement of February 10, 1891. The latter agreement cancelled all previous notes. He had all along believed the mine would give good finds, and he would have given almost anything before losing the concession. He had not considered that he could cancel the agreement with Coronel and Lawrence without repaying them the £3,000. He was always willing to repay the money, if he had it. He had paid Wessels £8,000, and had spent £7,000 in working the mine. When Wessels said that the agreement would be cancelled he did not tender witness the £8,000 he had paid. The promissory note was to be given by Coronel. Lawrence's name was to be kept out of the transaction. He was bank manager, and in that capacity would allow Coronel's account to be overdrawn. The real reason, however, was because if Lawrence's name appeared De Beer's would approach the bank and perhaps withdraw their account. De Beer's Company greatly objected to anyone who had anything to do with the company interfering in other mining ventures. When he went to Mr. Rhodes and asked for some débris-washing it was refused him because of his connection with the mine. He was certain that in any event he would have to pay £300,000 or lose the mine. The Wessels family had been offered £250,000 for the mine, he believed by De Beer's themselves.

Mr. Solomon: There is not a word of truth in that.

Charles Lipp, the present agent of the Cape of Good Hope Bank liquidators at Kimberley, gave evidence, examined by Mr. Juta, that he knew Coronel, and made certain investigations regarding the £2,000 promissory note given by him. The impression conveyed to his mind was that unless

the bill was met the concession in which Coronel was interested would drop. Ward went to Cape Town to see the liquidators about the bill, and when his negotiations failed witness considered the thing at an end. Coronel had told witness that by an understanding between Coronel and Lawrence, the latter was responsible for £1,000 of the £2,000 due on Coronel's note.

Cross-examined by Mr. Solomon: In February, 1891, he considered the matter was revived, and it was then his impression that Coronel was still interested.

George Shearer Armstrong, examined by Mr. Juta: In 1890 he went to England in connection with these concessions. He saw Coronel on his return in the Diamond-market in July, 1890. Coronel came and introduced himself as one interested in Ward s concession, and asked witness how things were progressing. He asked if the money from England would be forthcoming, and witness said he had great hopes that it would. Coronel said that Mr. Lawrence owed half of the bill, but he had no hope that Lawrence would assist him as he also was in a fix. He saw Marais about the end of July or the beginning of August, and a month afterwards told Coronel what Marais had said. He told Coronel that Marais had stated that unless the bill for £2,000 was paid in October it was not to be renewed, and Coronel then said he could not pay the money, nor could Lawrence. Coronel said he could not help it if the concession lapsed, and that he looked on the thing as worthless. On December 22, 1890, Ward offered to pay £2,000 to Marais, but the latter said it was too late then and he could not take it, he having reported the discovery of the new mine to Wessels. Ward could then get the £2,000 at any moment. He was in a great state of mind about the matter, he having been interested in the mine since 1887. The day before the £2,000 was offered by Ward Mr Haarhoff had seen Marais on behalf of Mr. Rhodes.

Cross-examined by Mr. Solomon: He had a share of Ward's share of the mine. When Coronel and Lawrence obtained a share in the concession witness was in England, but Ward wrote and told him that two persons had offered to lend him money, but he mentioned no names. He was afterwards informed that as Lawrence had left the bank there was no need for further secrecy. Coronel told witness Lawrence was liable for half the amount of the bill. He considered the agreement which ended July 1, 1891, was cancelled, and it was not true that up to December 22, 1890, Ward worked as though the agreement were still in existence.

Petrus Harmsen Marais, son-in-law of Mr. Wessels, examined by Mr. Searle: He had represented Wessels in Kimberley for some years. All agreements, however, were signed by Wessels, whom he consulted upon all important points. In December, 1889, a promissory note was falling due by Ward. He went to Ward's house in that month, and found Coronel there. He was introduced to Coronel, and then Ward said that he found great difficulty in floating the company owing to Wessels insisting upon fifty claims in the mine. Ward said that Wessels had promised him £25,000 if he sold the farm for £200,000. Lawrence's name was not mentioned on that occasion, nor did Coronel suggest that he held an interest in the mine, or that the purchase price should be reduced to £175,000. Witness took down no conditions at the interview. On the 16th January, 1890, Ward gave witness £3,000 in the Hon. W. Ross's office, but Coronel was not present. The same day he met Coronel, who asked if Wessels would recognise him if he went in the concession with Ward. He replied that Wessels only knew Ward in the matter. He only saw Lawrence on one occasion, when he asked witness for some diagrams. He had seen Coronel in Kimberley, and the latter told him he could not pay his promissory note of £2,000, he not having any money, and the share market being very depressed. Witness further stated that after the note had been protested, Ward came to see him and said that Coronel had left him in the lurch, but that Mr. Cross, who was then in London, would find the money. Subsequently, Mr. Haarhoff came to see him (witness) with an offer from Mr. Rhodes. On the next day Ward and Armstrong came to him again about the matter, and he (witness) told them that they were too late Ward seemed quite surprised, and said, surely Mr. Wessels will not refuse to renew the concession? Witness then suggested that he (Ward) should make Wessels a higher offer and that possibly the latter would extend the period of the concession. Ward afterwards offered £200,000. This was accepted, and the concession was renewed. He returned Ward the old promissory note for £2,000, and accepted a new note for £2,060. Witness considered that he had a perfect right to cancel the agreement. He had several better offers since for the farms.

Cross-examined by Mr. Solomon, Q.C.: In February, 1890, he knew Lawrence and Coronel were interested in Ward's concession, but he did not know to what extent.

Sir T. Upington then proceeded to address the Court, and contended that both Marais and Wessels must have known that Coronel and Lawrence were deeply interested in Ward's concession, and that this knowledge was sufficient notice whether the actual nature of their interests was disclosed or not.

Counsel had not concluded his argument when the Court adjourned.

SUPREME COURT.

THURSDAY, JUNE 25.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

CORONEL V. WARD AND WESSELS AND LAWRENCE V. WARD AND WESSELS.

The hearing of this case was resumed. The plaintiffs were again represented by Sir T. Upington, Q.C., Mr. Solomon, Q.C., and Mr. T. L. Graham; the defendant Ward by Mr. Juta and Mr. Jones, and Wessels by Mr. Searle.

Sir T. Upington continued his argument for the plaintiff, and said that by the agreement of the 10th February, 1891, all former rights of the plaintiffs were continued. He contended that the Court had already laid down that the non-payment by a purchaser of the purchase price was not sufficient reason for the dissolution of a contract, the onus being on the seller to sue for completion of the purchase.

Mr. Juta, for the defendant Ward, submitted that the plaintiffs had acquiesced in the rescinding of the contract. He quoted the case of Stewart v. Ahnelt (7 Juta, 117). In that case, which was a sale of property at Sea Point, the plaintiff paid part of the purchase price, and was warned that if he did not complete the transaction by a certain time the contract would be considered at an end. The Court held that the subsequent behaviour of Stewart was such that he had no intention to complete the sale, and the case went against him, though Ahnelt was ordered to pay back to Stewart money he had paid on account when the promissory note fell due. Coronel and Lawrence were warned that the agreement would be cancelled, but they were utterly unable to pay the money, and so acquiesced in the cancellation. Ward's evidence on that point was really not contradicted, and ought to be taken as correct. At the time plaintiffs alleged these transactions occurred no one either in Griqualand West or in England would have anything to do with the mine, but now that diamonds had been found everyone wanted a share in it. The evidence was clear that Lawrence's story that he had paid his £2,500 was not such as the Court could accept. Lawrence's own letters proved that he had not paid the £2,500. He contended most strongly that Wessels had the right to cancel the agreement when the promissory note fell due and was not paid. The behaviour of Lawrence was all along that of a man who believed that the concession had lapsed upon non-payment of the promissory note. Ward wrote to him several times at the end of 1890, when the note was maturing, and the merest tyro, a very child, would at once have replied that he had no further liability, he having paid his £2,500, yet the Court was asked to believe that an experienced bank manager was so innocent of ordinary business dealing as never for a moment to deny a liability he alleged he had not. It was not until 1891, when the diamonds were discovered, that Lawrence suddenly awoke to the fact that he was a sharer in the interests of Ward. At the time Ward was under the impression that unless the £2,000 were paid the concession would be lost. Lawrence said that he had £1,000 to spare, yet the Court had it that he never once offered at that time to discharge his liability, though he was told the concession was in danger.

Mr. Searle, in addressing the Court on behalf of the defendant Wessels, split up his argument into three heads. The first question, he said, was as to whether the right granted to Ward was an indivisible one, or divisible, and capable of being split up so as to bind the guarantor Wessels to these other parties. If it could be so split up, was sufficient notice given by Lawrence and Coronel to bind Wessels to them? If the Court were against him on both these points, he contended that Wessels had a perfect right to cancel the agreement upon non-fulfilment of the conditions, and failure to pay the promissory note. It was clear that the plaintiffs never for a moment imagined they had a right against Wessels. They set up Ward and Ward only. Marais had never for one moment acted in any important matter, like this of the concession of the Wesselton Mine, without in the first place consulting Wessels, who all along kept himself aware of the progress of the whole transaction. The position taken up by Marais, in his capacity as the representative of Wessels, had been during the whole time that Wessels would only recognise Ward in the transaction.

Counsel had not concluded his argument when The Court adjourned.

SUPREME COURT.

FRIDAY, JUNE 26.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

CORONEL V. WARD AND WESSELS AND LAWRENCE V. WARD AND WESSELS.

The hearing of this case was resumed. The plaintiffs were again represented by Sir T.

Upington, Q.C., Mr. Solomon, Q C., and Mr. T. L. Graham; the defendant Ward by Mr. Juta and Mr. Jones, and the defendant Wessels by Mr. Searle.

Mr. Searle continued his argument for the defendant Wessels, and said that all the parties interested clearly understood that non-payment of the promissory note meant cancellation of the agreement. As a fact Wessels did at one time terminate the agreement, and acted perfectly *bona fide* in doing so. The whole thing had been a speculation on the part of these persons, and he could not understand upon what principle Wessels was expected to return to Ward the moneys he had paid, seeing that he had the consideration provided for by his contract. He quoted "Gau v. McDonald" (Buchanan, 1874, 22), as showing that a joint venture in a diamond-mine was lacking in the essentials of a partnership.

The Chief Justice then gave judgment. His lordship said that there was really no difficulty in this case so far as it affected the defendant Ward, who had entered into the contracts of January, 1890, with the two plaintiffs. By each of those contracts he had ceded one-fourth of his rights and interests in the agreement with Wessels to each of the plaintiffs. The consideration given by the plaintiff Lawrence was the payment of £2,500 and the consideration given by the plaintiff Coronel was the payment of £500 in cash and a promissory note for £2,000. Now it had been strenuously argued on behalf of Mr. Ward by Mr. Juta that there was a collateral engagement between the parties, by virtue of which the plaintiff Lawrence was really a co-debtor upon the promissory note. He did not think, even if counsel had succeeded in proving that collateral arrangement, that would make any difference in the case, for such an arrangement could not in his opinion be allowed to influence the Court in regard to the present case. The collateral arrangement was clearly for the purpose of imposing upon the Cape of Good Hope Bank, to the knowledge of Ward, and in his opinion Ward could not take the advantage of the imposition to which he was a party. In his opinion the two plaintiffs, Lawrence and Coronel, stood on exactly the same footing. They had each paid part of the money due to Ward. One had paid £2,500, and the other £500. Whatever the private arrangement between Coronel and Lawrence was, the defendant Ward was not concerned. The Cape of Good Hope Bank might have something to say to the action of their manager Lawrence, but Ward had nothing to do with it; he having got his money was bound by his agreement. So far, therefore, as the plaintiff Lawrence was concerned, he had fully complied with the terms of his contract. He had paid his £2,500, and now claimed his share of the property. With regard to Lawrence, it was said that his whole subsequent conduct showed that, although there was not an express cancellation of the contract, yet there was an implied cancellation, and the case of Ahnelt was referred to, but, as he pointed out, the case of Ahnelt was entirely different to the present case. In that case there had been a small payment of £82, but notice was given that unless the remainder of the purchase price were paid the sale would be put an end to. No answer was given to that, and thereupon a fresh sale of the property was made. The Court held that no damages could be recovered, inasmuch as the defendant had been left under the impression that there had been an implied cancellation of the previous contract, but what did the Court find in the present case? On the 10th February, 1891, a fresh agreement was made by the defendant Ward with Wessels, but before that fresh contract was made he already had notice from Lawrence that he insisted upon a compliance with the terms of his contract. A letter had been put in, written from Johannesburg by Lawrence in January, 1891, in which he insisted upon having his full benefit under his contract with Ward. This was done before the final arrangement was made between Ward and Wessels. The case of Ahnelt, therefore, had really no bearing upon the present case. Coming next to the case of Coronel, he had paid only £500, and no doubt his liability still existed upon the promissory note for £2,000. It was perfectly clear that when the note fell due he was unable to pay, but a renewal was arranged, and when the renewed note fell due in October it was perfectly clear that then also he was unable to pay. Now, the defence set up by Ward was that inasmuch as Coronel was unable to pay, and that notice was given to him in October, that failing payment the whole contract would be cancelled, therefore he was now estopped by his conduct, and that it must be implied that there was a virtual cancellation. His opinion was that the conduct of Coronel would not in the least justify the Court in implying an intention to cancel the contract. No doubt he was unable to pay, and said so, but at the same time he said he was trying to raise the money, and he never by any act, or word, or deed led Ward to suppose that he at all relinquished his benefit under the contract, and indeed he said that, whatever Ward said about his being out of it, he still considered himself in it. In 1891 he gave notice, also sent from Johannesburg, that he still insisted upon his rights. Ward, having got that notice, ought to have stayed his hand, and ought to have insisted upon the rights he had in his contract with Wessels, as between them. At all events, he could not say there was a cancellation. He was justified in doing his best for all, but he could not say that he would keep this money and not tender back the

£3,000, but cancel the contract. In his opinion, whatever Ward did after that was for the benefit of all the parties to the original contract of January, 1890. If he gained any fresh advantages from Wessels, they were not for his benefit only, but also for the benefit of both the plaintiffs. In his opinion, therefore, the judgment of the Court must be in favour of the plaintiffs as against the defendant Ward. There was more difficulty in dealing with this case as it affected the defendant Wessels. A great many very interesting legal questions had been discussed, and he was satisfied of this, that if the Court came to the conclusion that Ward, when he entered into the fresh agreement, acted for the benefit of both the plaintiffs, and that he had an implied power to do so, then Wessels was justified in entering into the fresh contract with Ward. No doubt the plaintiffs would be entitled to the benefit of the fresh contract, but as far as Wessels was concerned, he was justified in implying that the powers exercised by Ward were authorised by the two plaintiffs. What was the position of the plaintiffs when Ward first entered into the matter? They were wholly unable to pay the money. If Wessels had gone to extremities, Ward and both the plaintiffs would have been sued, and would probably have become insolvent, and so lost the whole benefit of the contract. Through the action of Ward, no doubt, the price was increased from £175,000 to £300,000, but on the other hand, an extension of time was given from July, 1891, to January, 1892. At the time the fresh agreement was made there was certainly no prospect that the plaintiffs, when July, 1891, came round, would be able to pay for their share. Under all the circumstances, Ward, being driven into a corner, was justified in doing the best he could for the plaintiffs, and Wessels was justified in accepting his implied powers as authorising him to act for the benefit of the plaintiffs. Therefore, in his opinion, the plaintiffs were no longer in a position to insist upon the benefit of the contract of the 16th January, 1891. They might have their rights under any fresh agreement made by Ward, but they had not now the right to insist upon paying £175,000 on the 1st July and acquiring possession of the farms. They might have a right to offer £300,000 on the 1st January, 1892, and in the meantime he presumed they would be liable to pay the £2,000 due on the promissory note given by Ward to Wessels. They were liable for that, because it was not yet paid. He understood that by correspondence between the parties the time of payment had been extended from the 1st March to the 30th June, 1891, so that there were only a few days left for the plaintiffs to pay this £2,000 owing by Ward to Wessels. If Ward had at once recognised the right of the plaintiffs in regard to the fresh contract, the Court might have given judgment in Ward's favour, but he had refused to allow them any benefit under the contract, and he had treated the whole of the original contract as cancelled without tendering back any portion of the money paid him, and therefore the judgment of the Court must be against him, with costs. The judgment would be in terms of the 1st, 2nd, and 3rd prayers of the declaration. As to the 4th prayer, it was clear that could not be granted, but the following declaration would be made: "Declared that the plaintiffs are entitled each to the benefit of one-fourth of any rights acquired by Ward, by virtue of any agreement made by him with Wessels, with respect to the said properties. The plaintiffs' costs to be paid by Ward, but as to the defendant Wessels, his costs must be paid by the plaintiffs."

[Attorneys for the plaintiffs, Messrs. Scanlen & Sivfret; Attorneys for the defendant, Ward, Messrs. Findlay & Tait; Attorneys for the defendant, Wessels, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, JUNE 30.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

In re CHARLES BROAD.

Mr. Shiel moved for the admission as an attorney of this Court of Mr. Charles Broad, a solicitor of the High Court of Justice, England.—Mr. Broad took the oaths, and was duly admitted.

In re M. E. MACKENZIE.

On the application of Mr. Schreiner, Mr. M. E. Mackenzie was admitted to practise as an attorney.

In re J. M. BROWN.

On the motion of Mr. Joubert, Mr. J. M. Brown was admitted to practise as a notary public.

GENERAL MOTIONS.

PETITION OF ADELINE M. EATON.

On the application of Mr. Tredgold, leave was granted petitioner to sue by edictal citation in

forma pauperis in an action against her husband for restitution of conjugal rights, failing which for divorce.

IN THE INSOLVENT ESTATE OF MARTHA G. S. KLEYN.

On the motion of Mr. Tredgold, authority was given to the Master of the Supreme Court to call a special meeting of creditors in the said estate, for the election of a new trustee.

WILLIAMS V. SNOOKE.

Mr. Shiel applied for a rule *nisi* calling upon S. D. Snooke to show cause why petitioner should not be admitted to prosecute his appeal *in forma pauperis* against a judgment of the Chief Magistrate of Tembuland.

Referred to counsel for further consideration.

HUMPHRIES V. SPENCER.

Arbitration—Award—Rule of Court—Taxation.

Mr. Searle appeared for the applicant, and Mr. Schreiner for the respondent.

This was an application to make the award of the arbitrator in the dispute between the parties a rule of Court. Under the 12th section of the deed of submission it was agreed that the award might be made a rule of Court by either of the parties provided the other of them should not tender to perform the award within forty-eight hours after he should have been served with the same, or a copy thereof. And it was further agreed that in case such tender should be made the costs of the arbitration and award should be taxed by the taxing officer of the Supreme Court After the forty-eight hours referred to in the deed of submission had elapsed an offer was made on behalf of the respondent, through his attorneys, to pay the amount of the award and the taxed costs, but the taxing officer refused to tax until the award had been made a rule of Court. The respondent then suggested that the costs should be taxed by an attorney to be selected by the applicant. The latter, however, declined this offer.

Mr. Schreiner, on behalf of the respondent, contended that unnecessary costs had been incurred, and that when the taxing officer refused to tax, the offer of the respondent to abide by the taxation of an independent attorney should have been accepted.

The Chief Justice: The cost of an attorney in such a case would have been heavier than those of counsel moving to make the award a rule of Court.

The Court made the award a rule of Court with costs.

PETITION OF PETRUS F. JOUBERT AND OTHERS.

Mr. Searle applied for authority to amend the description of a certain piece of land, called ground adjoining Wilgebosch, in the district of Middelburg, by substituting No. 1,023 for No. 123 in the order of the honourable Court of the 27th November, 1890.

It appeared that in the will of petitioner's father lot No. 1,023 had been referred to as lot No. 123, and this, Mr. Searle contended, was clearly a mistake on the part of the testator, as he possessed no such lot as No. 123.

The Chief Justice remarked that the heirs might be interested in the matter, and that there ought to be a judicial declaration that a mistake had been made in the will.

The Court granted a rule *nisi* calling upon the heirs to show cause why the amendment should not be made.

PETITION OF LAVINA C. VAN HEERDEN.

Mr. Molteno applied for leave to the Master of the Supreme Court to release the farm Kwaade Plaats, in the district of Cradock, from the operation of a mortgage bond passed by the petitioner to secure the paternal inheritance of her minor children.

It appeared from the petition that the farm in question had been sold, but that under the bond sufficient other security had been hypothecated to provide for the balance still due under it.

The Court granted the Master the necessary power to release the farm in question, on his being satisfied that the other security referred to in the petition was sufficient.

PETITION OF SUSANNA J. BURN.

On the application of Mr. Tredgold, the Court granted a rule *nisi* (returnable on July 13) calling upon petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights.

CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. TWENTYMAN.

Mr. Schreiner appeared for the applicant (defendant), and Mr. Searle for the respondents (plaintiffs).

This was an application for leave to the defendant in the above suit to appeal to Her Majesty in her Privy Council from the judgment of the Supreme Court.

Mr. Searle, on behalf of the liquidators, consented to the appeal on the understanding that sufficient security was provided.

The Court granted the application.

IN THE ESTATE OF THE LATE JOHANNES L. VAN HEERDEN.

Mr. Searle applied for leave to amend an order of the Supreme Court, dated 11th November, 1890, by substituting for the ground proposed to be acquired from one P. S. van Heerden and transferred to the minor heir of the said estate the remainder of lot No. 5,547.

The Court authorised the Master to inquire into the matter, and to satisfy himself that the rights of third parties were not interfered with.

IN THE ESTATE OF THE LATE HESTER HOLLIDAY.

On the motion of Mr. Webber, leave was granted to raise a loan of £185 by way of mortgage of the landed property in the estate, for the purpose of satisfying debts thereof.

THE DAMARALAND MINING AND EXPLORATION COMPANY, IN LIQUIDATION.

Mr. Shiel presented the first report of the official liquidators of the above-mentioned company.

The Court ordered the report to lie open for inspection for fourteen days, one publication to be made in the *Government Gazette*.

STRUBEN V. THE CAPE DISTRICT WATER-WORKS COMPANY.

Mr. Juta and Mr. Molteno appeared for the applicants (defendants), and Mr. Schreiner for the respondent (plaintiff).

This was an application for leave to take the evidence *de bene esse* on commission of Mr. Wm. Ackermann, who is shortly proceeding to England under medical advice.

Mr. Schreiner pointed out to the Court that his client might be seriously prejudiced by Mr. Ackermann not being present at the trial, as it would be impossible to fully cross-examine this witness at the hearing of his evidence on commission.

The Chief Justice remarked that due allowance would be made for that circumstance at the trial.

The Court granted the order as prayed for, and appointed Mr. Tredgold commissioner. Costs to be costs in the cause.

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, JULY 7.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

PETITION OF MARTHA MANTLE.

Edictal citation—Leave given to sue by.

Mr. Castens, on behalf of petitioner, moved for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights.

Leave was granted to sue by edictal citation—returnable on the last day of next term—one publication to be made in the Kimberley *Independent*.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. STAMPER AND OTHERS.

Company—Bank in liquidation—Act 23 of 1861, sections 11, 12 and 13—Act 12 of 1868, section 22—Contributories—Excussion—Insolvent shareholders—Liability of past shareholders—Deed of settlement—Indemnity.

Mr. Juta appeared for the liquidators; Mr. Schreiner appeared for all the respondents except Messrs. W. Runciman, jun., Child, and Fletcher, and Mr. Searle for the respondent W. Runciman, jun.

This was an application by the official liquidators of the above bank for leave to place upon the list of contributories the names of Mrs. F. A. Knight and Messrs. W. Runciman, jun., J. Steytler, W. F. Stamper, T. Child, W. W. Thompson, J. R. Reid, W. S. Fletcher, and J. B. Paterson, in respect of certain shares registered in the names of William August Lippert and Jacob Pieter Deneys, of which they (respondents) were former proprietors.

Mr. Juta read the affidavit of Mr. Louis Anthony Vintcent, one of the official liquidators, which was to the effect:

That after realisation of all the assets of the bank, and excussion of all present shareholders to the full extent of their liability, namely, £30 per share, there would still be a considerable deficiency.

That Lippert and Deneys are the registered owners respectively of 245 shares and 378 shares, the calls on which amount respectively to £7,350 and £11,340.

That the estates of Lippert and Deneys have been sequestrated as insolvent, and the proportion of the net assets thereof to which the liquidators will be entitled against the respective estates of Lippert and Deneys will not be sufficient to meet the bank's claims.

The said Lippert acquired 225 of his shares from the above-mentioned respondents, viz., fifteen from Mrs. F. A. Knight, ten from W. Runciman, jun., fifty from J. Steytler, twenty from W. F. Stamper, ten from T. Child, thirty-five from W. W. Thompson, thirty-six from J. R. Reid, fifteen from W. S. Fletcher, and thirty-four from J. B. Paterson, transfer of which shares was given between the 24th January and 26th September, 1889.

That the said Deneys acquired 100 of his shares from the respondent J. R. Reid, and twenty shares from the respondent W. S. Fletcher, transfer of which was made on the 10th January, 1889.

The statutory return of the transfer of shares so acquired by Lippert, with the exception of nine shares transferred to him by J. B. Paterson on the 26th September, 1889, was duly filed in the office of the Registrar of Deeds on the 18th July, 1889, and a similar return of the shares acquired by Deneys was also filed on that date.

The return of the nine shares acquired by Lippert from J. B. Paterson was filed on the 9th January, 1890.

At the date of the stoppage of the bank the fixed deposits amounted to £1,848,723 11s. 11d., of which £11,709 were in existence prior to the 10th January, 1889, and still remain unsatisfied.

The defence of J. R. Reid, one of the respondents, appeared from his affidavit, which was read by Mr. Schreiner, and was to the following effect:

That the estate of Lippert was now being wound up, that it consisted of gold scrip and syndicate

shares, for which there was at present no sale, and that in consequence the estate had not been realised and liquidated.

With regard to Deneys's estate, which was also being wound up, it consisted of scrip and landed property, and there was every probability that a large dividend would be paid to creditors upon the final realisation of the estate.

That there was no liability imposed upon him (respondent) by, and no authority under, the Winding-up Act of 1868 to place him as a former shareholder on the list of contributories; but whatever his responsibility was, it arose under the second proviso of section 18, Act 23 of 1861, for any contracts or engagements entered into by the bank when he was a shareholder; but he (respondent) said that contracts or engagements increasing the liabilities of the bank to upwards of one million pounds sterling were entered into by the bank after he had ceased to be a shareholder, and he submitted that it would not only be contrary to the true intent and meaning of the said proviso, but manifestly unjust to make him responsible for debts, and that his money should be applied to discharge liabilities contracted by a partnership of which he was no member, and which liabilities included debts due to shareholders from whom he had received an indemnity upon the transfer of his shares.

Finally, that the creditors of the bank had already received 12s. 6d. in the £ upon their claims, and that it appeared from the report of the liquidators that the bulk of the gold scrip held by the bank remained unrealised, and that the recovery from present shareholders of the amount of calls had not been completed.

The defence of the other respondents, also incorporated in their joint affidavit, and read by Mr. Schreiner, was to the effect that the estates of Lippert and Deneys had been sequestrated, but that there was no statement of what had been recovered from the said estates, nor for what sum the respondents were sought to be held liable, and that if the present application were granted it would have the effect of a final judgment against the respondents for the full amount unpaid on the shares sold by them to Lippert and Deneys.

That the amounts required from the respondents far exceeded the whole amount of the alleged liabilities on the 10th January, 1889, and that the amount of those liabilities had been already reduced by dividends amounting to 12s. 6d. in the £, which had been paid to all creditors.

That according to the reports of the liquidators the assets of the bank had not been realised, nor all shareholders fully excussed, and that according to those reports there was a prospect of still further dividends, by which the liability would be further reduced.

That there was no specific account annexed to Mr. Vintcent's affidavit showing the position of the bank when the respondents sold their shares, nor was there a certain statement or sufficient proof that the existing shareholders would not be able to make good the deficiency after the realisation of the large quantity of gold scrip held by the bank. That until such realisation it would be impossible to ascertain whether the present shareholders would not be able to pay the whole of the liabilities; that the bank had not been fully excussed, nor had a full and specific valuation of the assets of the bank been placed before the Supreme Court.

That the liquidators should be put to rigid proof of the amount unsatisfied before attempting to make the respondents liable.

The liquidators speak hopefully of the realisation of the assets of the bank, and if there should be a deficiency it is for them to show conclusively what part of such deficiency is attributable to the debts which were in existence when the respondents sold their shares.

That the respondents were denied unconditional access to the books of the bank, and therefore they were unable to say whether the assets were undervalued or the liabilities overstated.

Lastly, that the account of the bank submitted to shareholders on the 15th August, 1890, showed a statement ending the 30th June, 1890, and by that statement *a dividend of 6 per cent. was declared in favour of shareholders.*

Mr. Juta, in moving for the order, said that the present application was founded on the judgment of the Court in Twentyman's case (1 C.T.L.R., 153), the only difference being that in the latter case Heath's estate had been finally liquidated.

Mr. Schreiner, for the respondents, contended that the present case was different to that of Twentyman's.

In Twentyman's case there had been an excussion of the present shareholder, and the deficiency had been ascertained.

In the present case there had been no ascertainment of the amount of the deficiency in either the estate of Lippert or Deneys.

The terms of Act 23 of 1861, section 18, had not been complied with, and until the section had been complied with the Court would not put past shareholders on the list of contributories.

Respondents were not sureties; they were subject to a defined statutory liability. Outside the statute they could not be held liable (section 11); therefore they could not be placed upon the list of contributories.

In Twentyman's case it did not appear that a larger sum was asked for than was required for the debts still remaining unsatisfied, which were debts when the shares were transferred. In the present case, on the 10th January, 1889, £11,700

of debts were in existence, which are still unsatisfied, but 12s. 6d. in the £ had been paid already, and for the deficiency, £4,887 10s., the respondents were now asked to pay £10,850 ; this was to compel them to pay for debts for which they were not liable under the statute.

Further, the unrealised assets of the bank, and the sums received from present shareholders, promised, according to the liquidators, a further dividend or dividends, and thus again the balance of £4,887 10s. would be reduced, and the claim on respondents diminished.

The respondents were entitled to an exact determination of the deficiency on the call of £30, and to a limited requisition to make good only so much as remained then unsatisfied of the debts on the 16th January, 1889.

It was the duty of the liquidators to show how much of the debts was due to shareholders, and the deficiency in respect of which respondents were liable, could only be ascertained after deducting the claims of such creditors who were shareholders.

Mr. Searle, for the respondent W. Runciman, jun., remarked that he had very little to add to what had been said by his learned friend (Mr. Schreiner). Counsel referred to Twentyman's case, and to the stringent terms of the 18th section of Act 23 of 1861.

Mr. Juta replied.

The Court deferred judgment.

Postea (July 18th.)

The Chief Justice said that before delivering judgment in this case the Court was anxious to obtain some information as to whether there were more past shareholders who ceased to be such about the time the respondents ceased upon whom a call was still to be made.

Mr. Juta said he would make the necessary inquiries.

The Chief Justice said that if counsel would get some of the liquidators to come before the Court and give evidence the Court would then proceed to give judgment.

Mr. Schreiner asked the Court to take into consideration, in giving judgment, the circumstance that the respondents, in taking over the liabilities of past shareholders, took over also their rights to any future dividend paid in the liquidation.

The Chief Justice said the Court must make a liberal allowance for assets, and also contributions from past shareholders who ceased to be such shortly after or about the time as respondents.

Mr. Juta asked if the evidence would be accepted in affidavit form.

The Chief Justice said it would be better if oral evidence were led.

Mr. Justice Buchanan said the point had been raised because in the case of one of the respondents, Mr. Paterson, his shares were transferred six months after some of the others.

At a later stage of the sitting,

Mr. David Mudie, one of the official liquidators, gave evidence. He stated that the liquidators had, in many cases, been forced to temporise a little, and not drive people into insolvency if it could be avoided. In many instances more money had been obtained by waiting for a time. Except in the cases before the Court, there were only two lots of ten and fifteen shares to be dealt with in like manner. In the case of the ten shares the holder could not pay.

Mr. Justice Smith: Do you mean you will get nothing?

Mr. Mudie: Nothing, my lord.

The Chief Justice: Is it definite, Mr. Mudie, that there are no more than ten and fifteen shares to be dealt with under the circumstances that they were transferred in the same manner as these?

Mr. Mudie: Yes, my lord. In the one case the holder had sixty-four shares as an "A" shareholder, and I believe there is no hope of getting the calls even on those paid in full.

The Chief Justice: I see it stated that access to the books was refused by the liquidators. Is that the case?

Mr. Mudie said that was not so. No one who had applied to see the books had been refused, except in one respect, in which the liquidators asked the Court to refuse access to the list of shares. He might say, with regard to that, that he mentioned to the persons in this case, in an official manner, that if they desired at any time to see the list connected with any particular account they might wish to examine into, it would be placed at their disposal. No shareholder who had applied to see the books had been refused. He had that on the authority of those who were carrying on the work of the bank. He knew that instructions were given by the liquidators that anyone applying to see the books should have every facility given them, with the restriction imposed by the Court.

The Chief Justice: 12s. 6d. has been paid; now, has any further dividend been yet decided upon?

Mr. Mudie: Not yet.

The Chief Justice: Will the funds realise 17s. 6d. in the £?

Mr. Mudie: I would not like to say that, my lord.

Mr. Justice Buchanan: Do you think 15s. will be obtained?

Mr. Mudie: I think so, my lord.

The Chief Justice: You see we cannot call upon these persons unless it is certain there will be a deficiency. Do you think there will be a deficiency of more than 2s. 6d. in the £?

Mr. Mudie: I cannot say, but we have no reason to think that the dividend will reach 17s. 6d. in the £.

The Chief Justice: Have you any reason to think it won't?

Mr. Mudie: I think so, my lord. I should not like to say beyond 15s. in the £, which I hope we shall reach.

The Chief Justice, in giving judgment, said: The object of this application is to have the names of the respondents placed upon the list of contributories in the winding up of the Cape of Good Hope Bank. The respondents are eight in number, and they are sought to be held liable as having been the former holders of 335 shares in this bank, which at the date of the winding-up order were registered in the names of W. A. Lippert and J. P. Deneys, who are now insolvent. As to nine of the shares formerly held by the respondent Paterson, the return of the transfer of his shares was made to the Registrar of Deeds on the 9th of January, 1890, and as to the remaining shares in question the return was made on the 18th of July, 1889. At the time of the winding-up order the bank was indebted to various creditors in respect of fixed deposits for £1,343,723, of which deposits to the extent of £12,700 were in existence at the date when Paterson ceased to be a holder of nine of his shares, and £11,700 when the remaining respondents ceased to be shareholders. Numerous side issues have been raised on this application, but as they have been disposed of in previous cases no further reference need be made to them. The questions which I shall now proceed to consider are *four* in number, and the *first* is whether the respondents are relieved from liability by the 20th section of the deed of settlement, which provides for the discharge from liability of proprietors whose shares have been transferred to others. The Court has more than once held that the section in question affords no answer to creditors who seek, through the liquidators, to have their debts paid by persons who were partners at the date when the debts were in existence. If, as in Hofmeyr's case (2 Juta, 365), the bank had been an unlimited one, and there had been a reasonable probability that the present members would be able to pay all the debts, the Court would of course have given effect to the 20th section, as it would have been manifestly unjust to call upon past members to contribute under such circumstances. But seeing that the liability of the members of the bank now in question is limited, and that the creditors will not be paid in full even if all members, past as well as present, are made to contribute to the full extent of their liability, the Court cannot allow the section to defeat the paramount interest of the creditors. The *second* question is whether the respondents are entitled to the benefit of payments made to creditors, whereby their claims have been reduced by the sum of 12s. 6d. in the £. In considering this question, I must again point out that one important effect of an order for winding up a company under the Act of 1868 is that, after such order, the creditors can no longer sue the shareholders, past or present. The duty of paying the debts *pro rata* is cast upon the liquidators. For that purpose they must cause the assets of the company to be collected, and must recover the deficiency from the contributories to the extent of their liability. They are not, however, bound to realise all the assets before proceeding against the contributories, for the mere order of winding up is a sufficient excussion of the company. Who then are to be contributories? Clearly, in the first instance, the present shareholders. If it is reasonably clear that the assets of the company, together with the contributions of present shareholders, will be insufficient to meet the liabilities of the bank, then past shareholders may be made contributories. They, however, have no greater ultimate liability cast upon them by the Winding-up Act than that which clings to them as former partners of the concern, with the qualifications which have been introduced in their favour by the 18th section of Act 23 of 1861. As to the qualification which requires excussion of the present holder of the shares formerly held by such past holder, I shall presently have to say a few words. Another privilege which they enjoy at common law as well as by statute is that they cannot be held liable for more than the debts which existed when they ceased to be members. If those debts have been reduced by means of the contributions obtained from other past members and present members they are entitled to the benefit of the reduction. Therefore shareholders who ceased to be such at the time when debts to the extent of £11,700 existed cannot be held liable for more than if the debts had amounted to £4,387, and shareholders who ceased to be such when debts for £12,700 existed cannot be held liable for more than if the debts had been £4,762. The older creditors have no preference over the later creditors by reason merely of the priority of their claims, but all the concurrent creditors must share *pro rata* amongst themselves. The shareholders themselves, however, who have ceased to be such cannot be called upon to pay more to the liquidators than they would have been liable to pay to the creditors if the bank had not been ordered to be wound up. In deciding upon the liabilities of such past shareholders, this Court must give effect to the common law relating to partnership and to the Act of 1861, except in so far as they are inconsistent with the later Act of 1868. The *third* question is whether the respondents are entitled to ask the Court to take into consideration the probability that they will all be able to contribute towards payment of the debts existing when they ceased to be shareholders, and the further probability that other shareholders who were such when they ceased to be so, or became such afterwards, may

be able to make further contributions to the assets of the company. This question must also, in my opinion, be answered in favour of the respondents. Without taking all these circumstances into consideration, it would be impossible for the Court to adjust, as it is directed by the 22nd section of the Act of 1868 to do, the rights of the contributories amongst themselves. It is quite true that if there had been no winding-up the creditors might have recovered from any single former member the full amount of his debt to the extent of such member's liability, but the main objects of the Winding-up Act are to effect an equal distribution of the available assets among all the concurrent creditors and to provide a machinery for levying contributions, from all who are liable to contribute, with the least inconvenience or injustice to individuals. The rights of creditors must of course be treated as paramount, but if it is reasonably clear that money paid by virtue of a call would afterwards have to be refunded, in order to produce the requisite equality among the members, the Court ought to make the necessary reduction in the amount of the call. In the case of Twentyman no such reasonable probability existed, seeing that the debts at the time when he ceased to be a shareholder amounted to over half a million pounds, but in the present case there appears to me every reason why deduction should be made from the calls to be made upon the respondents. It is not alleged that any of them will be unable to pay, and the liquidators themselves seem to have admitted that further dividends to the extent of 2s. 6d. from sources independently of contributions from past shareholders will be paid. It is greatly to be regretted that the liquidators have not been in a position to lay before the Court a general scheme for dealing with the past shareholders. If that had been done we should have known whether there are more past shareholders who ought to be called upon to contribute with the respondents. If there are more such past shareholders it seems extremely probable that there will be a very material reduction in the amount claimable from the respondents in payment of the debts which existed when they respectively ceased to be members. Even the contributions from those who ceased to be members at a later date, as well as from present members, will have to be deducted *pro rata* from the debts claimable from the respondents as well as from debts incurred at a later date. It is extremely difficult for the Court, with the meagre information before it, to make an estimate of the amount which will be required from the respondents in order to produce the requisite equality among all members past and present. If the matter were not so pressing, and the time were not so close at hand within which execution, if it is to issue at all, can issue against the respondents, I should certainly refuse to take upon myself the duty of making the necessary arithmetical calculations, which belong to the liquidators. As the matter stands our estimate is necessarily a rough one, and it is made with the distinct understanding that if the call now made against the respondents should prove too high they will be entitled to a readjustment hereafter. We are of opinion that from the call of £30 there must be deducted the sum of £25 15s., and in respect of Paterson's nine shares in question the sum of £25 10s. per share. The result, stated in another way, will be that the call will be reduced to £4 5s., and in the case of Paterson's nine shares to £4 10s. per share. The *fourth* and last question is whether the respondents can be held liable at all until the insolvent estates of Lippert and Deneys have been respectively liquidated, and the dividends payable by those estates in respect of the calls and the shares in question have been ascertained. The Court has already decided that the sequestration of a person's estate as insolvent amounts to a process in the nature of execution against his property or effects. In the present case both Lippert and Deneys have failed to pay anything in satisfaction of their primary liability, and the secondary liability of the respondents attaches. The original call in respect of the shares amounts to £30 each. No portion of that call has yet been paid by the trustees of the respective insolvent estates to the liquidators. Under the first part, therefore, of the 13th section of Act 23 of 1861, execution could issue against the respondents for the full amount of the call, and it is only by virtue of the subsequent provisos of the section that the Court has felt itself justified in reducing the amount of the respondents' liability to £4 5s. and £4 10s. respectively for each share. Now, supposing that either of the insolvent estates should pay a dividend of 5s. in the £, that would still leave 15s. to be paid, and the respondents could derive no benefit from such payment. But supposing a dividend of more than 17s. in the £ were paid, then the respondent Paterson, if he has paid his £4 10s. per share, would be entitled to a cession of action from the liquidators of so much of the dividend awarded on his nine shares as exceeds 17s. in the £. In other words, if he has paid 9-60ths of the call the liquidators would not be entitled to more than the remaining 51-60ths, being the proportion of 17s. to the £. In the same way those of the respondents who pay £4 5s. per share would be entitled to the benefit of anything over 17s. 2d. in the £ that may be paid as dividends by the respective insolvent estates. It has not been suggested that either estates will pay dividends for those amounts, or anything approaching them, and there can therefore be no reason for postponing the call on the

respondents until these estates have been liquidated. The result is that the respondents will be placed upon the list of contributories, but that in view of the small proportion of present debts which the bank owed when they respectively ceased to be shareholders, the call of £30 will be reduced by the sum of £25 15s. per share in the case of all the shareholders except Paterson for his nine shares. Inasmuch as a larger proportion of debts existed when he transferred those nine shares, the call in respect of them will be reduced by the sum of £25 10s. Execution will therefore be allowed to issue for £4 5s. per share except in respect of Paterson's nine shares in question, for which execution will issue against him at the rate of £4 10s. per share. No order as to costs.

Mr. Schreiner maintained that the respondents were entitled to costs.

The Chief Justice said that as to costs, the Court thought that as the liquidators ought really to have devised a settlement of this puzzle—if he might call it so—themselves, the respondents were not to blame for coming into court, and each party might fairly be called on to pay his own costs.

Mr. Justice Smith concurred.

Mr. Justice Buchanan concurred with the judgment of the Chief Justice, though, he said, he had arrived at the conclusion by a different process. Under the English Companies Acts it was laid down that a "B" shareholder was liable unless he had transferred his shares more than twelve months before the liquidation of the company. That differed from the Colonial Act, under which the period was two years from the time when execution was applied for. Under the English law the claim upon the present respondents would not have been made until the bank was liquidated. Looking at the evidence which had been placed before the Court, he thought that a very fair amount had been arrived at in fixing the calls as the Chief Justice had mentioned. The difficulty the Court had had to meet was to apply two Acts which were somewhat conflicting in their terms. He thought the adjustment most fair and reasonable, and concurred with the judgment of his lordship the Chief Justice. His lordship added that several excellent authorities on the question existed, but had not been placed before the Court. His Lordship referred to the following cases: "Webb v. Whiffin" (5 Ch., 428; L.R., 5; H.L., 711) and "*In re* the Oriental Bank" (Brett's case and Morris's case, 8 Ch., 800).

[Attorneys for the Bank Messrs. Reid & Nephew; Attorneys for W. Runciman, jun, Messrs. Fairbridge & Arderne: Attorneys for the other Respondents Messrs. Van Zyl and Buissinne.]

In re THE ANTE-NUPTIAL CONTRACT OF WRIGHT AND DRENNAN.

Ante-nuptial contract—Settled land—Sale—Leave given to vary investment.

On the application of Mr. Tredgold, leave was given to the trustee of the said contract to sell the settled landed property, no investment to be made of the proceeds except in first mortgage of landed property, or Government securities, without the leave of the Court.

WOODMAN V. ROBINSON.

On the motion of Mr. Graham, the Court granted a rule *nisi* calling upon the respondent to show cause why applicant should not be admitted to sue him *in forma pauperis* in an action for damages.

IN THE ESTATE OF THE LATE MARY MARONEY.

On the application of Mr. Watermeyer, the Court granted an order in terms of the Master's report.

SUPREME COURT.

MONDAY, JULY 13.

Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

PROVISIONAL ROLL.

WILLIAMS V. SAMUELS.

Mr. Molteno moved for provisional sentence on an unsatisfied judgment for £80.—Provisional sentence granted.

JACKSON V. CUTTING.

On the motion of Mr. Searle, provisional sentence was granted for £28 12s. 1d.

GROENEWALD V. BOTHA.

On the application of Mr. Webber, provisional sentence was granted on a mortgage bond for £250.

VAN DER BYL AND CO. V. RODE.

On the motion of Mr. Juta, provisional sentence was granted on a promissory note for £171 18s. 9d.

BERRANGE V. EMETT.

On the application of Mr. Maskew, provisional sentence was granted on an acknowledgment of debt for £55 1s. 8d., less £5 paid on account.

PROTECTEUR FIRE ASSURANCE COMPANY, IN LIQUIDATION V. DU PRE.

On the motion of Mr. Maskew, provisional sentence was granted on a mortgage bond for £1,000 and the property declared executable.

ODENDAAL V. MATTHEE.

On the application of Mr. Joubert, an order for the provisional sequestration of defendant's estate was granted.

SOUTH AFRICAN MUTUAL LIFE ASSURANCE ASSOCIATION V. DU PLESSIS.

On the motion of Mr. Thorne, provisional sentence was granted in terms of consent upon a mortgage bond for £1,750, less £50 paid on account.

TRUSTEES VAN WYK'S ESTATE V. DE JAGER AND OTHERS.

On the application of Mr. Searle, this matter was ordered to stand over pending a settlement.

KUYS AND ANOTHER V. BADENHORST.

On the motion of Mr. Tredgold, provisional sentence was granted on a mortgage bond for £20.

PARTRIDGE V. PARTRIDGE.

On the application of Mr. Juta, a writ of civil imprisonment was granted on an unsatisfied judgment for £46.

SOUTH AFRICAN LOAN AND MORTGAGE AGENCY V. BAIRD.

On the motion of Mr. Watermeyer, the Court ordered the final adjudication of the defendant's estate. The provisional order was granted on the 19th June last.

ELDER'S EXECUTORS V. WILLEY.

On the application of Mr. Searle, the Court granted provisional sentence on an unsatisfied judgment for £86.

HIDDINGH V. STOCKDALE.

On the motion of Mr. Maskew, provisional sentence was granted for £6,780, due on a mortgage bond of £8,000 by non-payment of interest.

NATHAUSOHN V. CONRADIE AND LAMBERT.

On the motion of Mr. Juta, provisional sentence was granted on a promissory note for £880.

KNYSNA DIVISIONAL COUNCIL V. KANNEMEYER'S EXECUTORS.

On the application of Mr. Moltene, provisional sentence under rule 829 was granted for £72, due in respect of rates.

SCOTT V. BEVERN.

On the motion of Mr. Watermeyer, provisional sentence was granted for £20 14s. 4d., work and labour executed.

REHABILITATIONS.

On motion from the bar, the rehabilitation of the following insolvents was granted: W. H. P. Boshoff, S. A. Jordaan, A. Langford, P. S. S. Marais, A. A. Muller, P. M. Rentzke, E. C. H. Roux, L. F. Haak, and R. H. Myburgh.

GENERAL MOTIONS.

LAWRENCE AND OTHERS V. WARD AND WESSELS.

Mr. Juta appeared for the applicant Ward; and Sir T. Upington, Q.C., and Mr. T. L. Graham for the respondents.

This was an application for leave to the defendant Ward to appeal to Her Majesty in Her Privy Council from the judgments of this Court in the said suits.

Sir T. Upington, Q.C., consented on the usual security been given, and the Court granted the application.

In re J. G. L. HYLAND.

De lunatico inquirendo—Funds in possession of *curator bonis*—Disposal of.

Mr. Searle moved, on behalf of the *curator bonis* (Mr. E. R. Syfret), for the direction of the Court as to the disposal of funds already in his hands, and for such further sums as may be subsequently received.

Mr. Hyland's case was before the Court on the 10th February last (1, C.T.L.R., p. 31), when he was found to be mentally unfit to manage his own affairs. The Court on that occasion appointed Mr E. R. Syfret *curator bonis* of Mr. Hyland's property, but declined to declare Mr. Hyland of

unsound mind. Mr. Hyland is at present an inmate of the Valkenberg Asylum.

Mr. Molteno read an affidavit sworn to by Mr. Hyland's brother, from which it appeared that the former had been removed to the Valkenberg Asylum at the instance of his wife; that the deponent was most anxious that his brother should leave the asylum; and that he (deponent) was willing to look after and maintain his brother.

Mr. Graham informed the Court that he had acted on the previous occasion as Mr. Hyland's *curator ad litem*, and strongly opposed his being declared of unsound mind.

The Chief Justice said that the matter would stand over till to-morrow. In the meantime an order would be served upon Dr. Dodds, the superintendent of the Valkenberg Asylum, requiring him to produce Mr. Hyland in court to-morrow, at ten a.m., together with the affidavits upon which Mr. Hyland had been removed to, and received into, the asylum. The question of the funds in possession of the *curator bonis* could then be disposed of.

Postea (July 14)

This matter, which was before the Court on Monday, came on for further hearing.

Mr. Giddy watched the case on behalf of Dr. Dodds; Mr. Searle appeared for the *curator bonis*, Mr. E. R. Syfret; and Mr. Molteno for the brother of the alleged lunatic.

Dr. Dodds, the Superintendent of the Valkenberg Asylum, examined by the Court, stated that he received Mr. Hyland into the asylum on the 16th of March last. (The witness produced the documents on the authority of which he had received Mr. Hyland into the asylum.)

Mr. Giddy remarked that the alleged lunatic had not been removed to the asylum under Act 20 of 1879, and that his present detention was illegal. It had, however, been the custom for many years to remove persons of this class to an asylum when they had no friends to look after them.

Mr. Justice Buchanan: Under whose authority was Hyland removed to the asylum?

Mr. Giddy: Under the regulations framed by the Colonial Secretary.

Mr. Justice Buchanan: The Colonial Secretary has no legal right to make such regulations.

The Chief Justice: This is a particularly serious case in face of our decision on the 10th February ast, when we found that there was not sufficient evidence before us to justify our finding Hyland to be of unsound mind.

Dr. Dodds, continuing his evidence, said that Mr. Hyland was distinctly of unsound mind. He refused to eat under a delusion that his throat was stopped up, and were it not for very careful watching and attention he must have died of starvation.

Cross-examined by Mr. Molteno; He (witness) would not have advised Hyland's going to Hout's Bay. He did not think the change would have done him any good. He saw no force used when Hyland was brought to the asylum. His condition was such that he ought not to have been allowed to roam about.

Mrs. A. C. Hyland, examined by the Court, stated that it was at her request that the certificates were signed upon which her husband was removed to the asylum. Mr. Hyland's brothers did not come near him. Her life was in danger. One night her husband came to bed with an open knife. Between the 13th and 16th March her husband developed dangerous symptoms. She did not know that her brothers-in-law were willing to look after her husband. She had no private means. There were two children of the marriage, both girls, one aged eight and the other three. She objected to her brother-in-law Henry looking after her husband, because she thought that he would be better cared for in the asylum. She had had no quarrel with her brothers-in-law.

Cross-examined by Mr. Molteno: She objected to her husband's going to Hout's Bay because she did not think that the change would have done him any good. She did not tell her husband where he was going when she took him to the asylum.

Henry Hyland, examined by the Court, stated that he only ascertained that his brother was in the asylum three days after he had been removed to that institution. He (witness) was prepared to maintain his brother. He purposed, however, leaving him in the asylum until he was better.

In answer to Mr. Molteno, witness said that he was not aware that his brother was dangerous. His brother did not want to remain in the asylum, and had accused him (witness) of having sent him there.

Mr. Hyland, the alleged lunatic, was then examined by the Court, but he appeared to be unable to understand any of the questions addressed to him.

Mr. Searle informed the Court that in addition to the sum of £240 which was in the possession of the *curator bonis* there was a further asset in the estate, consisting of household furniture, valued at about £100, and it had been suggested that this furniture should be given to Mrs. Hyland.

The Chief Justice, in giving judgment, said it was quite clear that James Hyland was of unsound mind, and his case was now much worse than it was on a previous occasion The Court would therefore declare him to be of unsound mind, and would appoint his brother (Henry Hyland) *curator* of his person. Mr. Syfret, as *curator* of his property, would pay the £240 into the hands of the Master with power from time to time to draw such sums as might be required for the

maintenance of the lunatic, his wife and children. It would be understood, without making it part of the order that Mr. Henry Hyland would be personally responsible for the maintenance of the lunatic, and would not remove him from Dr. Dodds' care without that gentleman's consent. As to the furniture, Mr. Syfret might deal with it as he proposed, namely, leave it with Mrs. Hyland, who proposed to start a boarding-house. The detention of the lunatic at the asylum was now perfectly legal.

Attorneys for the *curator bonis* Messrs. van Zyl & Buissinne; Attorneys for Mr. Henry Hyland Messrs. Fairbridge & Arderne.]

DE BEER'S CONSOLIDATED MINES, LIMITED V. GOOD.

Lease—Lessor and lessee—Debris washing—Tacit re-location—Interdict.

Mr. Schreiner appeared for the company, and Mr. Searle for the respondent.

This was an application for an interdict restraining respondent from continuing débris-washing operations on the portion of the mining area connected with the Kimberley Mine, leased to him by the De Beer's Company. The facts of the case are as follows: In the month of September, 1889, the company entered into an agreement of lease with the respondent for the use by him of a portion of the depositing floors in the Kimberley Mine, for the purpose of being used by him in connection with certain débris-washing operations, then and for some time previously carried on by him. The lease was for one year, at a rental of £200 per annum, payable half-yearly in advance, and to be renewable at the option of the applicant company for a further period at the expiration of that time. The respondent paid to the company the rent for the said site as from the 1st January, 1890, and continued in the use and occupation thereof until the 3rd January, 1891, when he paid to Mr. W. Pickering, an official of the company, the sum of £100 as and for six months' rent reckoned from the 1st of that month. The company alleged that this amount was received by Mr. Pickering in ignorance of the fact that the company had decided not to grant a renewal of the lease of the said site. Subsequently, however, the company decided to allow the respondent to continue to occupy the said site until the 30th June, 1891. As the respondent still continues in possession of the site referred to, the company now applied for an interdict restraining the respondent from continuing his washing operations, or otherwise trespassing on the portion of the mining area connected with the Kimberley Mine.

Mr. Schreiner, for the company, contended, on the authority of Voet (19, 2), that the lessee could not, as in the present case, hold over as against his landlord. Pickering had no power from the company to grant a lease, or to renew the lease, and the receipt by him of the £100, on behalf of the company, did not amount to a tacit relocation.

Mr. Searle, for the respondent, submitted that the present case was not one upon which the Court would grant an interdict. The company had sustained no damage, and their proper course was to bring an action for ejectment.

After further argument, the Court ordered the matter to stand over until the 31st August.

SUPREME COURT.

TUESDAY, JULY, 14.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

THE WELLINGTON BANK, IN LIQUIDATION.

Winding-up Act—No. 12 of 1868—Application to be placed under operation of.

Sir T. Upington, Q.C., moved for an order placing the bank under the Winding-up Act, and appointing Messrs. J. J. de Villiers, W. A Joubert, and J. F. Pentz official liquidators. Counsel said that the bank had been a perfectly solvent concern, whose business had been taken over by another bank. The shareholders had passed a resolution in favour of voluntary liquidation, and all that now remained was to deal with certain outstanding bank notes, to the value of some £455. It was also desired that the Court would fix a date for the receipt of any claims against the bank.

The Chief Justice said it was a very cumbrous method of arriving at a simple result.

Mr. Justice Smith: Why was not the bank placed under the Winding-up Act at once?

Sir T. Upington: I believe the shareholders preferred voluntary liquidation.

The Court granted an order placing the bank under the Winding-up Act, and appointing the three gentlemen named official liquidators, with the full powers mentioned in the 15th section of the Act. The Court would fix the 1st of December as the date for the receipt of claims, publication in the *Gazette* and two Paarl papers.

WOODMAN V. ROBINSON.

Mr. Graham moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent for damages.—Granted. Mr. Graham to be counsel in the case.

GROENWALD'S EXECUTRIX V. BENEKE.

Edictal citation—Leave given to sue by.

Mr. Schreiner moved for leave to attach *ad fundandam jurisdictionem* of this Court certain landed property, described in the mortgage bond passed by the defendant, and to sue by edictal citation for recovery of the amount thereof.

The order was granted, personal service if possible, failing which publication in the Free State *Express*. The order returnable on the last day of next term.

PETITION OF BERNHARD GUMPERT.

Mr. Shiel moved for an order to make absolute a rule *nisi* for the registration, in petitioner's name, of a certain erf or lot of ground, marked No. 318, situate in the village of Walmer, in the district of Port Elizabeth.

The order was granted.

IN THE ESTATE OF THE LATE ANNA MICHAU.

Mr. Molteno, moved for leave to the executor dative of the said estate to file an amended liquidation account, and to recover the amount of debts not proved for in the account already filed, and of the sums paid into the Guardians' Fund to the credit of the minor heirs, in so far as they are liable to contribution.

The order was granted.

PETITION OF NICHOLAS FREDERICK UYS.

Mr. Schreiner moved to make absolute the rule *nisi* for the registration of the title, in the name of petitioner, of a piece of land called Lichtenberg, at the Mossels Bank River, Cape district, measuring 59 morgen and 200 square roods, together with a piece adjoining, in extent 2 morgen and 340 square roods.

Mr. Searle appeared for J. P. Retief, and submitted an affidavit to the effect that the land in question was originally bequeathed to thirty local farmers, who authorised the applicant's father to reside on the property, but not the applicant. The affidavit, deponent stated, contained the views of several others interested in the property. One of the conditions upon which the permission was given to the applicant's father was that the property should, at all times, be under the management of the owners or their representatives. The ground was used as a public outspan.

Mr. Schreiner said he had no objection to the ground being still used as a public outspan. All his client wanted was transfer.

Mr. Searle contended that that was what his friend's client was not entitled to.

Mr. Giddy held a watching brief for the Government, but said the interest of the Crown in the land had ceased.

Mr. Schreiner said his client had erected substantial buildings on the land, and paid all the rates and taxes continuously. Counsel added that he had just been informed that the death of Mr. Uys, sen., took place thirty-six years ago, instead of twenty-six years as stated in the petition. He had sent for the death notice, which would be put before the Court.

The case was adjourned *sine die* for the production of further evidence.

In re THE ALBION MASONIC HALL COMPANY LIMITED.

Mr. Juta moved for an order placing the said company under the operation of the Winding-up Act of 1868, and appointing an official liquidator thereto.

The order was granted. Messrs. W. E. Moore and C. C. Silberbauer were appointed official liquidaters. Publication of the order in the *Cape Times* and *Cape Argus*.

PETITION OF WILLIAM LEE.

Mr. Maskew moved to make absolute the rule *nisi* for the cancellation in the Debt Registry of a certain mortgage bond passed by petitioner in favour of the assignee of his estate.

The order was granted.

BURN V. BURN.

Mr. Tredgold moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action for restitution of conjugal rights, failing which for dissolution of the marriage subsisting between the parties.

The order was granted.

IN THE ESTATE OF THE LATE J. S. MASTERS.

Mr. Graham moved for leave to the executor to raise a loan on mortgage of the landed property in the estate for the purpose of satisfying claims thereon.

The order was granted.

In re THE ANTE-NUPTIAL CONTRACT OF DENEYS AND BAKER.

Ante-nuptial contract—Leave given to the trustee to raise money on mortgage of the settled land to pay off claims in husband's insolvent estate.

Mr. Schreiner moved for leave to the trustee under the said ante-nuptial contract to raise a loan on mortgage of certain land and buildings at Plumstead for the purpose of satisfying a claim of the trustees of the insolvent estate of J. P. Deneys in respect of property transferred to his wife in 1890.

The order was granted.

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. BELSON.

Mr. Schreiner moved for leave to issue execution against the Rev. W. E. Belson, in respect of the call of £80 on 115 shares registered in his name.

The order was granted.

PETITION OF C. J. M. TRUTER.

Mr. Watermeyer moved for an extension of the return day of the rule *nisi* granted in this matter to August 31, and also for leave to serve summons in the case upon respondent, at the same time.

The order was granted.

IN THE ESTATE OF THE LATE BAREND J. PIENAAR.

Mr. Maskew moved for an order to make absolute the rule *nisi* for the amendment of certain transfer deed relating to three erven in the village of Bethesda, by substituting the name Barend Jacobus Pienaar for that of Barend Johannes Pienaar.

The order was granted.

THE PAARL BANK, IN LIQUIDATION V. WICHT.

Company—Bank in liquidation—At 12 of 1868, section 21—Contributory—Set off—Execution.

Sir T. Upington moved for leave to issue execution against Christian Lodewyk Wicht in respect of the call of £250 on fifteen shares registered in his name. Counsel said that the question which would arise in the case was as to the exercise of the powers given to the Court under section 21 of Act 12 of 1868. He moved on the affidavit of Mr. Steytler, one of the official liquidators. The respondent had made reply to the demand by the liquidators that he was willing to pay the claim on condition that certain fixed and floating deposits, to the amount of over £2,000, were allowed as a set-off. The liquidators were of opinion that, when every shareholder had been excussed, the bank would not pay a dividend of more than 10s. in the £, and that the set-off could not be allowed, inasmuch as it would amount to a preference to the respondent.

Mr. Schreiner appeared for the respondent, and read the answering affidavit of Mr. Wicht, to the effect that he was unable to pay the full amount of the call, £3,750. All that he could pay was the difference between the claim and amount due to him by the bank. If the liquidators drove him into insolvency they would lose the benefit deponent offered in the event of his offer being accepted. It would be necessary for him to make cession of his estate in any case, but if the liquidators were allowed to succeed in that application, he would at once be driven into insolvency. Under a special financial arrangement he was willing to pay £1,600 in hard cash, the amount of the difference.

The Chief Justice said the only argument that could be urged by the respondent was that it was really for the benefit of the liquidators that their own application should not be granted, but the liquidators thought it necessary in the interests of the liquidation that the set-off should not be allowed. In the case of the Union Bank it was clear that the existing shareholders would be able to pay the liabilities of the bank, but in the present case it was not denied that all the assets and contributions would not enable the liquidators to pay more than 10s. in the £, and it was quite clear that a further call would have to be made. That being so, the Court would grant the order as prayed, though he thought it would have been to the interest of the liquidators themselves to have accepted the terms offered by the respondent.

REGINA V. PRINCE.

Appeal from the sentence passed by the Resident Magistrate of Robertson on appellant on conviction upon a charge of breach of the peace.

The case was ordered to stand over to next term.

TRUSTEES VAN WYK'S ESTATE V. JAGER AND OTHERS.

Mr. Searle moved for judgment on a mortgage bond for £655.—Provisional sentence.

The Court adjourned till Tuesday.

PETITION OF THOMAS SAMPSON.

Act 28 of 1883, sections 73 and 76—Con travention—Conviction—Fine—Review—190th rule of Court—Exception

Application for leave to bring proceedings under review by reason of their gross irregularity refused on the grounds that the exception should have been taken *in limine*.

Sir T. Upington, Q.C., moved for leave to bring under review the proceedings in the prosecution and conviction of applicant under the Licensing Act held before the Special Justice of the Peace at Durbanville, on the ground of their gross irregularity.

The facts of the case, which appear from the petition, are as follows:—

It appears that Mr. Sampson (the petitioner) has held his licence for twenty-two years, and during this period no complaint had ever been made as to the manner in which he conducted his hotel.

On Monday evening, 18th May last, three coloured men bought two bottles of wine which they consumed on petitioner's premises and then left. On the following morning when the petitioner was occupied in doing some plastering to his house, the Messenger of the Court accosted him and said Mr. Horak (the Special Justice of the Peace for Durbanville) wished to see him at the Court. The Messenger neither served a summons nor cited the petitioner, nor informed him what he was wanted for, but on his arrival at the Court, where he found Mr. Horak sitting and the three men who had been at his canteen the previous evening in attendance, he was told by Mr. Horak that he was charged with having sold a bottle of brandy to one of the three while in a state of intoxication, and asked if he admitted the charge. The petitioner denied the charge, whereupon Mr. Horak proceeded to question the three men on the charge, which they affirmed, and the Magistrate fined petitioner £5, which was paid. Petitioner further alleged that no summons or citation was served upon him so that he might prepare to defend himself, nor was he asked if he had any witnesses to produce or allowed time to produce witnesses; and that, though he was permitted to put questions to the three men examined for the prosecution, having no skill or experience in the cross-examination of witnesses, he was deprived by the summary form of procedure of the opportunity of obtaining competent legal assistance in his defence. After petitioner had paid the fine he forthwith instructed his attorneys in Cape Town to notify to Mr. Horak his intention of appealing against the judgment. The attorneys accordingly wrote to Mr. Horak on the 21st May to that effect, requesting at the same time to be furnished with a certified copy of the record, for which their client would pay the proper fee. Prior to the receipt by Mr. Horak of the attorney's letter the record had been forwarded for submission in the ordinary course to the Judge in Chambers, by whom it was returned to the Special Justice to correct the Section of the Act under which the petitioner had been charged. This correction being made, the judgment was certified in the usual form, the Judge not being aware of the notice of review before the Supreme Court.

Sir T. Upington, Q.C., now applied for leave to bring the proceedings under review under the 190th rule of Court on the grounds of their gross irregularity.

Counsel detailed the facts of the case as stated above, and submitted that this was a matter which ought clearly to be brought under review.

The Chief Justice, in giving judgment, said that there was no place of its size where there were more cases of drunkenness than at Durbanville, and the applicant was, he supposed, one of those who contributed to that by selling liquor to persons in a state of intoxication. There was nothing to show that any prejudice had been sustained by the applicant. In any case the exception ought to have been taken *in limine*. The application would be refused.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

TUESDAY, JULY 21.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

In re DAVIS.

On the application of Mr. Juta, Mr. William Ernest Gordon Davis was admitted to practise as an attorney and notary public.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HERMANN OPPENHEIM.

Mortgage Bond—Application for cancellation of where bond could not be found after death of mortgagee—Rule *nisi*.

Mr. Searle moved for authority to the Registrar of Deeds to cancel certain mortgage bond for

£5,000, passed in favour of the deceased by one Nathan Birkenruth, now also deceased, hypothecating a certain farm called Schoepers Pan, in the district of Hope Town, the said bond not being forthcoming, and the land hypothecated being about to be sold.

The Court granted a rule *nisi* calling upon all persons interested to show cause on the last day of next term why the authority prayed for should not be granted. One publication of the rule to be made in the *Government Gazette*.

SAVINGS BANK V. BEAUMANN.

Mr. T. L. Graham applied for an order authorising the Sheriff to accept an offer of £700, made for certain quit-rent farm known as Jaafontein, situated in the district of Fraserburg, the said property having been offered for sale in execution of a judgment of this Court in September, 1884, and no bid made.

It appeared from affidavit that the farm, which was in extent 3,539 morgen, had originally been mortgaged for £650, but this amount had been increased, by the non-payment of interest, to £900 odd; there was also a second mortgage on the property for £500, but as the second mortgagee did not appear in the proceedings, the Court did not enter into the consideration of his rights but granted the order as prayed for.

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY, LIMITED V. CATHYPADYACHY.

Appeal—Extension of time—Leave—Act 5 of 1879, section 11—Arrest of person *ad fundandam jurisdictionem*.

Mr. Juta and Mr. Searle appeared for the applicants; the respondent was not represented by counsel.

This was an application for leave to prosecute an appeal from a judgment of the High Court of Griqualand West, given on the 21st May last, the time within which an appeal could be noted having expired.

The facts of the case are as follows: It appears that in May last Mr. J. B. Currey, the manager of the company, caused a summons to be issued against the respondent, who is a tenant of the company, for arrear rent due under a lease held by him from the company. The summons was duly served, and the case set down for hearing on the 21st May, when an exception was taken on behalf of the defendant (present respondent) to the jurisdiction of the Court, on the grounds that the defendant was not domiciled in the Colony. The exception was upheld by the High Court, and the application for provisional sentence refused. Mr. Currey thereupon reported the matter to the Board of Directors in London, and the Board instructed him to prosecute an appeal in the Supreme Court. Mr. Currey, in his affidavit, deposed that not being aware that his directors would desire to appeal from the judgment of the High Court, he failed to comply with the provisions of Act No. 5 of 1879, section 11, by noting an appeal within twenty-one days after the judgment had been delivered, and now prayed that leave to bring the appeal might be given.

Mr. Juta: The question of jurisdiction is an important one, as there are other cases of a like nature now pending.

The Chief Justice: Was an application made to attach *ad fundandam jurisdictionem*?

Mr. Juta: There was nothing to attach except the respondent's interest under the lease, and the latter, although a *jus in re*, still being of an *incorporeal nature*, would have been difficult to attach.

The Chief Justice: If the Court found that the respondent had changed his domicile it might have attached his person by arrest *ad fundandam jurisdictionem*, as the respondent was in Kimberley when the case was heard.

Mr. Juta, continuing his argument, said that the three months referred to by section 11 had not yet elapsed. Counsel also referred to the 43rd section of the Charter of Justice, and to the case of "Sneyman v. Le Grange" (3 R., 25).

The Chief Justice, in giving judgment, said that he assumed the Court had the power to extend the time within which the company could appeal. The company had, however, failed to appeal within the proper time, and in his (the Chief Justice's) opinion no sufficient reason had been shown why the period should be extended. Leave would be refused with costs.

SAVINGS BANK V. DE BEER.

On the application of Mr. T. L. Graham, the Court ordered an amendment of the order of Court of the 18th June last, by substituting the name of Friederick Carl Johan Kramann for that of Jesse Hill, as the bidder whose offer of £350 for certain farm called Hawden, in the district of Peddie, the Sheriff was authorised to accept.

JASSIEM & OTHERS V. THE MASTER & STEYTLER.

IN THE ESTATE OF THE LATE ABDOL RAGMAN.

Mr. Searle asked that this matter might be allowed to stand over as some affidavits had not yet been furnished.

Mr. Schreiner consented, and the matter was ordered to stand over, until the first day of next term.

IN THE ESTATE OF THE LATE HERBERT EVERITT.

Mr. Searle moved for an order directing that the funds awarded out of the said estate to the minor Horace Beck Everitt, and paid into the Guardians Fund, might be applied towards his maintenance and education.

The Chief Justice remarked that in a matter of this kind, where there had been an express provision in the will, the Master would have been justified in paying out the money without an order of Court.

The Court granted the application.

In re THE APPLICATION OF J. H. LAMB.

Mortgage bond—Omission of general clause—Amendment.

Mr. Searle moved for leave to amend a certain mortgage bond passed by Matilda Passmore in favour of petitioner for £1,200, by adding thereto a clause containing a general mortgage. On the 9th June last a mortgage bond for £1,000 was passed by Matilda Passmore in favour of John Hudson Lamb. After the bond was received from the Deeds Office, duly passed and registered, it was discovered that the general clause had through an oversight been omitted, although the power of attorney under which it was passed specially authorised and directed its insertion. In order to remedy this omission it was suggested to obtain a fresh power of attorney and pass a new bond cancelling the previous bond, and with this intention application was made for a refund of the stamps on the bond, and authority for such refund was obtained. Owing, however, to the difficulty anticipated in obtaining a fresh power of attorney, the method suggested for correcting the defect in the bond was abandoned. The authority of the Court was now asked for, *either* to pass a fresh bond under the original power to bear even date, and to take the place of the defective one, *or* to amend the said bond by adding the general clause thereto.

After argument,

The Court granted leave to the Registrar of Deeds to consent to the insertion of the general clause on his receiving the written consent of the subsequent mortgagees.

In re R. H. CAFFYN.

On the application of Mr. Graham, Miss L. Caffyn was appointed *curator bonis*.

BARNETT AND CO. V. THE NAMAQUALAND LICENSING COURT.

Licensing Court—Act 28 of 1883, section 50—Refusal to renew a licence which had been held for three years—Appeal.

Notwithstanding section 50 of Act 28 of 1883 the members of a Licensing Court can decide from their own personal knowledge whether the renewal of a licence should be granted or not.

Mr. Schreiner appeared for the plaintiffs, and Mr. Giddy for the defendants.

This was an appeal from a decision of the Namaqualand Licensing Court refusing the plaintiffs a renewal of their licence, although they had been in possession of it for three years. The facts of the case are as follows: The Licensing Court sat on the 4th March last, when the plaintiffs applied for a renewal of their licence which they had already held for three years. The Court refused to renew the licence on the petition of the Rev. Mr. Robson, a missionary who lived about fifteen miles away in a different field-cornetcy, and who alleged that natives from his mission station and farm servants in the district got drunk at plaintiffs' canteen, and that a licensed house was not required at this particular place. Some members of Court also expressed an opinion that there was no necessity for continuing the licence. From this decision the plaintiffs now appealed, and claimed a renewal of their licence and costs, *de bonis propriis*, of such members of the Court as had refused their application.

Mr. Schreiner contended that under Act 28 of 1883, section 50, the plaintiffs having held a licence for three years, were clearly entitled to a renewal.

The Chief Justice: So that, if a man is of bad fame and character, under section 50 his licence must be renewed?

Mr. Schreiner: Yes, under this section; the Court can always vary the conditions.

The Chief Justice referred to section 48, which enacts that the Court may of its own motion take notice of any matter or thing which in the opinion of the members thereof would be an objection to the granting of a licence, or to the renewal, transfer, or removal of a licence, although no objection has been made by any person. In any such case the Court shall inform the applicant, and shall adjourn the further consideration of the application, should the applicant so request, for any period not less than four days, in order that the person affected by such objection may be offered an opportunity of replying thereto. The Court shall, after any such

adjournment, give notice in writing, signed by the president, of the cause of objection to the person affected thereby, and of the day on which the adjourned application will be considered.

Mr. Justice Smith inquired what the nature of the objection was.

Mr. Schreiner read the objection, and contended that under section 46 the Rev. Mr. Robson had no *locus standi*, as he was not a person residing in the field-cornetcy wherein the renewal was applied for.

The Chief Justice: There is nothing in the Act to prevent outsiders from objecting.

Mr. Justice Buchanan: The applicants might have applied for an adjournment under the 48th section, but they do not appear to have exercised their right.

The Chief Justice: Why should not the members of the Court decide from their own knowledge whether a renewal should be granted or not?

Mr. Schreiner: The Licensing Court is not in a position to determine such a question; if it were, what is to become of the right of renewal given by the Act? What protection has a man who has held his licence faultlessly for three or more years?

The Chief Justice: The protection in the present case is that the applicants might have asked for an adjournment. The proceedings took place in the presence of applicant's agent, Mr. Van Niekerk.

Mr. Schreiner: The Court should have had something before it on which to have acted.

The Chief Justice: One of the members, Mr. Rossouw, spoke from his own knowledge.

Mr. Schreiner: Mr. Rossouw said he had seen a petition from some of the most influential farmers in the district against granting a renewal of the licence, but it had not been sent in owing to the distance these farmers lived from the Court. Surely this was not such evidence as the Court ought to have received.

The Chief Justice: Mr. Rossouw also remarked that there had been a great many cases of drunkenness at this canteen, and that on one occasion his own life had been in danger.

Mr. Schreiner: The plaintiffs are entitled to a renewal under section 50. The objections were not legal, and were not supported by proper evidence. Plaintiffs had not received notice as required by the Act. The Legislature could never have intended to confer such powers on Licensing Courts, that without complying with the terms of the Act they could enter on their records a refusal to renew a licence. What became of the title conferred by the Act? The decision in this matter would in all probability influence a discussion now being carried on elsewhere. What was the use of the vested right conferred by section 50 if it could be divested by section 52?

The Chief Justice, in giving judgment, said that Mr. Schreiner had argued that the plaintiffs were entitled to a renewal of their licence under the 50th section of the Act, inasmuch as they had held their licence for three years or upwards, but the terms of this section were subject to the other provisions contained in the Act. Section 52 enunciated the objections which might be taken to the renewal of any licence. Strictly speaking, Mr. Robson's objection was not sufficient; but the Licensing Court had acted on their own personal knowledge, as they had a perfect right to do under section 48—and in his (the Chief Justice's) opinion, the Court had full powers, even though an applicant might have held his licence for twenty years. If the applicants had not had notice, the Court would have acted illegally in not giving such notice, but the matter had been publicly discussed in the presence of the applicants' agent, and if he had so requested, no doubt an adjournment would have been granted. Such being the case, he (the Chief Justice) was of opinion that the Licensing Court had acted quite within their rights in refusing to renew this licence on the grounds that a licensed house was not required in this particular neighbourhood. Further, he (the Chief Justice) did not think it right that Courts which had done their duty, as this Court appeared to have done, should be harassed by proceedings of this kind, instituted by unsuccessful applicants, and if the Court had incurred any costs such as those between attorney and client, he would have been prepared to have given costs against the plaintiffs. If Licensing Courts were not protected they would be afraid to do their duty. The appeal would be dismissed with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. van Zyl & Buissinne; Defendants' Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, JULY 28.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

In re THE MINORS BRUWER.

On the motion of Mr. Juta, authority was given to the tutors dative to join with the co-proprietors and the said minors in a sub-division of the quit-rent place De Hoop, in the district of Robertson.

IN THE ESTATE OF A. H WALSH.

Mr. Searle, on behalf of the surviving spouse, Mrs. Walsh, of Uitenhage, applied for leave, as testamentary executrix, to raise a loan on mortgage of the landed property in the estate for the purpose of satisfying a claim thereon.

It appeared from affidavit that at the time of Mr. Walsh's death he was indebted to the amount of £600 ; of this sum £325 has been paid off by the widow, but there still remains a balance of £800, made up of a bond for £200, and a promissory note for £100. The holder of the latter is pressing for payment, and hence the present application.

The Chief Justice remarked that the only difficulty was the question of interest on the proposed bond, the property was valued at £900, and 8 per cent. appeared to him to be a very high rate to pay on such good security. Eventually the Court granted the required leave, Mrs. Walsh to make the best terms she could with regard to interest.

In re WILLIAM BECKHAM.

Mr. Schreiner applied for the appointment of a *curator ad litem* in proceedings about to be instituted to have one William Beckham declared to be of unsound mind and incapable of managing his affairs, and for the immediate removal of the alleged lunatic to the Valkenberg Asylum.

Several affidavits were read, from one of which it appeared that Mr. Beckham had within the last few days developed dangerous symptoms, and had actually assaulted some members of his family.

The Chief Justice : If the alleged lunatic is dangerous, why has he not been removed under Act 20 of 1879 ?

Mr. Schreiner : The case is exceptional. Certain facts were not before the Magistrate, and it is only within the past few days that Mr. Beckham has become dangerous. He (counsel) was instructed that Dr. Dodds had refused, after recent decisions, to admit patients into the Valkenberg Asylum without an order of Court. Under these circumstances it was deemed advisable to come to the Court about the matter.

The Chief Justice : To do what you ask us to do would be going out of our way to establish a precedent, for which there is no necessity as the Act is sufficient. An inquiry as to the state of Mr. Beckham's mind could be held on the first day of next term, and in the meantime he could be placed under the care of a keeper. With regard to the alleged objection of Dr. Dodds, what the Court had held was that the detention of lunatics who had not been certified as "dangerous" was illegal.

The Court granted a rule *nisi* calling upon William Beckham to show cause on the 1st August why he should not be declared of unsound mind and incapable of managing his affairs, and appointed Mr. Molteno *curator ad litem*.

SUPREME COURT.

SATURDAY, AUGUST 1.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

DU TOIT V. DU TOIT.

On the motion of Mr. Maskew, provisional sentence was granted on a mortgage bond for £750, less £80 paid on account.—The property specially hypothecated was declared executable.

PAARL BANK, IN LIQUIDATION V. LE ROUX.

On the application of Sir T. Upington, Q.C., the final adjudication of the defendant's estate was granted.

UNION BANK, IN LIQUIDATION V. CLARK.

Mr. Schreiner moved for provisional sentence on four promissory notes for £250 with interest.—Provisional sentence granted.

SMITH V. LATEGAN.

On the motion of Mr. Searle, provisional sentence was granted on a mortgage bond for £200.—The property specially hypothecated was declared executable.

SOUTH AFRICAN LOAN AND MORTGAGE AGENCY V. BRUHNS.

On the application of Mr. Tredgold the matter was ordered to stand over for the production of further affidavits.

WARNER & CO. V. TOMKIN.

On the motion of Mr. Juta, judgment was granted in terms of consent for £300 and taxed costs.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Hendrick Christoffel Haarhoff, John Halkett and wife, Edward Benjamin Cotterell Hoole, and Hendrik Servaas Meder.

BECKHAM V. BECKHAM.

De lunatico inquirendo.

Mr. Schreiner appeared for the plaintiffs, and Mr. Molteno as *curator ad litem* for the defendant.

This was an action instituted by Mrs. Beckham and others to have Mr. William Beckham declared of unsound mind and incapable of managing his person and property.

Dr. G. B. Silke deposed that he had examined the defendant on the 21st July last, although he (witness) had never seen the defendant before the latter greeted him most cordially. He was labouring under a delusion that he was engaged in a business which was yielding a return of £10,000 a day, and saw no reason this amount should not be increased to £1,000,000 a day. He also talked incessantly and incoherently. Witness was of opinion that the defendant was of unsound mind and incapable of managing his person and property, and he (witness) had signed a certificate to that effect.

Cross-examined by Mr. Molteno: He would not say that defendant was dangerous. Exaltation of ideas in a lunatic was generally a forerunner of paralysis.

Dr. Scholtz corroborated the evidence of the last witness.

Mr. William Daniel Beckham deposed that his father was of unsound mind; he had assaulted witness. Coming down from Johannesburg defendant was very violent and had to be placed under restraint.

Mr. Molteno informed the Court that he had visited the defendant on two occasions, and was clearly of opinion that he was of unsound mind.

The Court, after hearing the evidence, declared the defendant of unsound mind and incapable of managing his affairs, and appointed his eldest son, Mr. William Daniel Beckham, curator of his person, and Mr. H. Gibson curator of his property. Costs to come out of the estate.

[Plaintiffs' Attorney, C. C. de Villiers.]

PETITION OF NICHOLAS F. UYS.

Act 28 of 1881—Application for registration of title — Prescription — Rule *nisi* discharged.

Mr. Schreiner appeared for the applicant, Mr. Searle for the respondents, and Mr. Giddy for the Government.

This was an application, under Act 28 of 1881, to make absolute a rule *nisi* for the registration in petitioner's name of certain landed properties known as Lichtenberg, situated at the Mossels Bank River in the district of the Cape.

Mr. Schreiner read several affidavits sworn to by the petitioner and others, from which it appeared that petitioner's father had been overseer of the properties in question until his death, in 1860, from which time the petitioner has been in possession of the land, and has expended considerable sums of money in erecting buildings, planting trees, &c.

Mr. Searle read the affidavits of Mr. J. P. Retief and others, which were to the effect that the land in question was originally bequeathed to thirty local farmers, who authorised the applicant's father to reside on the property but not the applicant. One of the conditions upon which the permission was given to the applicant's father was that the property should be at all times under the management of the owners or their representatives. Part of the land in question had been used as a public outspan. The affidavits of J. J. Malan and D. J. Malan were also read.

Mr. J. J. Malan, in reply to the Court, said that he was forty-four years old, and that he had lived on the land in dispute for thirty-three years. After the death of old Mr. Uys, his (witness's) father was appointed overseer. Two of the men who had appointed his father were still alive.

Cross-examined by Mr. Schreiner: He was a son-in-law of the applicant, and was on friendly terms with him. He could not say if his father was insolvent and in needy circumstances when he came to live on the farm. He (witness) had been insolvent, and had not been rehabilitated.

Mr. D. S. Malan, examined by the Court, corroborated the evidence of his brother (the last witness), and stated that he was present when his father was appointed overseer.

Mr. P. L. Russouw deposed that his father had been one of the original owners of the land in question. He did not remember when old Uys died, but he remembered D. Malan being appointed overseer. He had frequently seen Malan on the farm in that capacity.

Mr. Schreiner, for the applicant, contended that there was no committee in existence in the year 1860 which could have appointed D. Malan overseer, as all the members of the old committee had died before that year. The applicant had had undisturbed possession for over thirty years, he had acquired ownership by prescription, and was entitled to have the land registered in his name. The fact that the Malans had lived on the land for some years could not affect applicant's rights.

Mr. Searle was not called upon to reply.

The Chief Justice, in giving judgment, said that when the application was first made he had doubts as to whether a rule shouldbe granted. As, however, several persons appeared to be interested in the land in question, he (the Chief Justice) thought that it would be well to have the matter fully discussed. Several interested parties, including descendants of the original owners, had now appeared to oppose the rule being made absolute. The two Malans had been just as long in possession of the land as the applicant, and had quite as much right to the ownership as he had. In his (the Chief Justice's) epinion, the applicant had had no such occupation as would confer upon him a prescriptive title. Under these circumstances the rule would be discharged with costs.

In re MARY ARTHUR.

Mr. Molteno moved for an order declaring Miss Arthur to be of sound mind, and releasing her curators from the charge of her person and estate.

The affidavits of Dr. Dodds, Dr Murray, and Mr. Arderne were read, from which it appeared that Miss Arthur was now perfectly sane, and capable of looking after her person and property.

The Chief Justice said that from the medical evidence which was before the Court on the last occasion they had no other course open to them but to declare Miss Arthur of unsound mind. He was pleased to find that the same doctors were now of opinion that Miss Arthur had quite recovered; the Court would accordingly declare her of sound mind, and release her curators.

PETERS V. PETERS.

On the application of Mr. Jones, this matter was ordered to stand over until the 18th instant.

In re THE DAMARALAND MINING AND EXPLORATION COMPANY, IN LIQUIDATION.

Mr. Shiel presented the first report of the official liquidators of the above-mentioned company, and moved for confirmation of the same.

The Court confirmed the report.

PETITION OF STEPHAN BROS.

On the motion of Mr. Graham, the Court made absolute the rule *nisi* for the registration in the names of petitioners of the title to certain share in a piece of land known as Buurman's Twist, situated in the division of Malmesbury.

IN THE ESTATE OF THE LATE MARTHINUS P. LOUBSER.

Mr. Graham applied for authority to the tutors dative of the minor Hendrick C. Loubser to draw from the inheritance out of the said estate to his credit in the hands of the Master an annual allowance towards his maintenance and education. The inheritance in question amounts to £287, and an allowance of £50 per annum was asked for.

The Court granted the order.

PIET V. PIET.

On the motion of Mr. Molteno, the Court ordered the removal of the cause for trial at the next Circuit Court for the district of Oudtshoorn.

PETITION OF PETRUS F. JOUBERT AND OTHERS.

On the application of Mr. Searle, the Court made absolute the rule *nisi* for the amendment of the order of this Court dated 27th November, 1890.

PHILLIPS V. PHILLIPS.

On the motion of Mr. Giddy, the Court made absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties by reason of the defendant's failure to return to her husband as ordered.

BURGER'S EXECUTRIX V. BURGER'S EXECUTOR.

Sir T. Upington, Q.C., appeared for the plaintiff, Mr. Schreiner for the defendant, and Mr. Juta as *curator ad litem* for the minors.

In this matter judgment for £78 and costs was entered in terms of consent. The Court also granted a rule *nisi*, calling upon all persons interested to show cause on the last day of term why the lost bond should not be cancelled; one publication to be made in the *Government Gazette*.

SUPREME COURT.

MONDAY, AUGUST 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

IN THE ESTATE OF THE LATE JAMES CRAIK.

Mr. Shiel applied for the appointment of Mr. Robert Bell as *curator bonis* in the above-mentioned estate. The late Mr. Craik carried on

the business of a grocer in Long-street, Cape Town, Mr. R. Bell being his manager. On the 14th February, 1890, the deceased executed a general power of attorney in favour of Mr. Bell, and subsequently went to England, taking with him his wife and family. In the same month Mr. Craik and his wife executed a mutual will, appointing the survivor of them sole heir, and in case of the death of both without having made a fresh will, appointed George Craik (now a minor) sole heir, and Mr. R. Bell sole executor. Mr. Craik died in Edinburgh on the 29th July last, and consequently the power of attorney above referred to becomes void. Mr. Bell now asked to be appointed *curator bonis*, with powers to manage the business generally in the interests of the widow.

The Court authorised the Master to appoint Mr. Robert Bell *curator bonis*, with permission to carry on the business on his finding security.

STEWART V. KINGON.

Sir T. Upington, Q.C., appeared for the plaintiff the defendant in default.

This was an action to recover the sum of £63, balance of account for cash and shares lent to the defendant. The defendant set up a claim in reconvention for £210.

The Court, after hearing the evidence of the plaintiff and of Mr. Graham Spiers, gave judgment for the claim in convention, and absolution from the instance with regard to the claim in reconvention.

[Plaintiff's Attorney, Mr. J. Hamilton-Walker.]

REGINA V. ADELBURG.

Criminal law—"Attempting to commit theft by false pretences"—Indictment—Act 3 of 1861, section 7—Point reserved—Conviction upheld.

This case came on for argument on a point reserved at the last Criminal Sessions by his lordship the Chief Justice, at the request of Mr. Juta.

Mr. Juta now appeared for Adelburg, and Mr. Giddy for the Crown.

The facts of the case are as follows: On the 27th May last Adelburg visited Mr. Charles Hayward, who keeps the South African Hope Hotel in Pepper-street, and said to him that a friend of his, named Barnett, who had come from Kimberley had some nice stones for sale, and that there was a chance of making £100 if Mr. Hayward liked to purchase the stones. Mr. Hayward replied that he would like some little time to consider it, and requested Adelburg to call again in the morning. Mr. Hayward, who had his suspicions aroused, then communicated with the police authorities, with the result that two detectives, Edward Thomas Newton and Florence McCarthy, came to the hotel early next morning, and were stationed in the dining-room, which overlooked the back yard, and the shutters of which were so arranged that the detectives could see anything that transpired in the yard. Between half-past eight and nine o'clock Adelburg arrived, bringing with him Barnett, and Mr. Hayward, as arranged with the detectives, took the two men into the back yard. When there, Barnett drew a handkerchief from his pocket, untied the corner, and produced two stones wrapped up in paper. He showed the stones to Mr. Hayward, told him they weighed fifty carats, and that they were worth 58s. a carat, but that Hayward might have them for 30s. a carat. There, Barnett continued, was £100 staring him in the face. Detective Newton, peeping through the shutter, saw the stones produced, but could not hear what was said. Mr. Hayward made a pretence of entering the house to fetch money, but in reality to warn the detectives, who thereupon came out and arrested both Adelburg and Barnett. The police took charge of the stones, and afterwards submitted them to Mr. Henry Francis Seale, jeweller, of Church-street, who pronounced them to be glass. On being searched at the station a third false stone was found on Adelburg.

At the trial Barnett was acquitted, but Adelburg was found guilty, and sentenced to twelve months' imprisonment with hard labour. Mr. Hayward, in his evidence, admitted that he had no intention to buy the stones, and that his object in telling Adelburg to return on the following morning was that the police might "trap" the prisoners.

The point reserved for argument was whether Adelburg had been rightly convicted of attempting to commit theft by false pretences notwithstanding the fact that Hayward did not intend to buy the stones, and consequently could have sustained no prejudice.

Mr. Juta, on behalf of the prisoner, took the preliminary objection to the indictment that it was bad, inasmuch as it charged the prisoner with attempting to commit theft by false pretences, without alleging what specific thing had been attempted to be stolen.

The Chief Justice: This objection was not taken at the trial, and is not the point reserved.

Several precedents of similar indictments were produced, and the indictment under consideration was found to be in "common form."

Mr. Justice Buchanan referred to Act 3 of 1861, section 7.

Mr. Juta, continuing his argument, contended that the prisoner had not attempted to commit theft by false pretences as alleged in the indictment, but that his offence was fraudulently

attempting to induce Hayward to enter into a contract. Counsel proceeded to draw a distinction between the crimes of *falsum* and *furtum* referring in his argument to Carpsovius, pars. II., Q. 93, obs. I, sec. 12, and urged that under the circumstances as disclosed in the evidence the conviction could not not upheld.

The Chief Justice, in giving judgment, said that an objection had been taken to the indictment which had not been raised at the trial. This objection was, however, effectually disposed of by sec. 7, Act 3 of 1861, which had been referred to by Mr. Justice Buchanan. With regard to the point reserved, he (the Chief Justice) was of opinion that it must be decided against the prisoner. All the elements which could constitute the crime charged were present, there was the intention and the overt act, and it was not impossible that Hayward might not at the last moment have changed his mind and bought the stones, as he (the Chief Justice) had pointed out at the trial. Under these circumstances, he was of opinion that the prisoner had been rightly convicted, and that the conviction must be upheld.

Their lordships concurred.

BULTFONTEIN MINING BOARD V. ARMSTRONG AND THE L. AND S. A. EXPLORATION COMPANY.

Trespass—Action for damages—Interdict—Mining Board—Act 19 of 1883, section 34—Exclusive control and management of Mining Area—Statutory reserve—Encroachment—Mining operations—Construction—Ordinance No. 11 of 1880, Griqualand West—Bye-laws—Appeal from judgment of High Court.

Mr. Schreiner and Mr. T. L. Graham appeared for the appellant (the plaintiff in the Court below); Mr. Juta for the respondent Armstrong; and Mr. Searle for the London and South African Exploration Company.

This was an appeal from a decision of the High Court of Griqualand West in an action instituted by Mr. William Charles Chitty Erskine (in his capacity as chairman for the time being of the Bultfontein Mining Board) against Mr. Alexander Armstrong and the London and South African Exploration Company for trespass. The facts of the case appear sufficiently from the pleadings.

The plaintiff in his declaration alleged that he was the chairman of the Mining Board for the Bultfontein Mine, duly constituted under Act 19 of 1883, and as such was the proper person to sue in this action.

That the first-named defendant was a digger residing in Bultfontein.

That the said Mining Board were in lawful occupation of, and were vested by Act 19 of 1883 with the exclusive control and management of a certain area connected with the said Bultfontein Mine, for the benefit of the claimholders of the said mine, which area, called the Mining Area, had been duly surveyed, defined, and proclaimed in terms of section 34 of Act 19 of 1883.

That in or about May, 1890, the first-named defendant, who was not a claimholder in the said mine, and who was not entitled to enter the said mining area without the consent of the said Mining Board, trespassed upon the said area and wrongfully and unlawfully, and without the consent of the said Mining Board, erected certain washing machinery thereon, and washed therewith, and continued to wash certain débris, the property of the said Mining Board, thereby causing loss and damage to the said Board.

That the defendant (Armstrong), though requested so to do, refused to remove the said machinery and to discontinue washing débris within the said area.

For an alternative count the plaintiff alleged that, by virtue of the powers given to Mining Boards by Griqualand West Ordinance No. 11 of 1880 to pass bye-laws, the said Mining Board had passed a bye-law, under the said Ordinance, prohibiting any person from entering the said mining area without the authority or permission of the said Mining Board, which said bye-law had been approved of by the Governor and Executive Council and duly promulgated, and had legal force and effect.

That at divers times between May, 1890, and the present time the defendant (Armstrong) had wrongfully and unlawfully entered and continued to enter the said mining area and wash débris therein without the permission of the said Mining Board, in contravention of the said bye-law.

For a further alternative count, the plaintiff alleged that in the year 1881 an agreement was entered into between the London and South African Exploration Company, the owners of the farm Bultfontein, on which the said Bultfontein Mine is situate, and the claimholders of the said mine, whereby a certain area round the said mine (within which area the aforesaid machinery was erected by the defendant) was set apart and dedicated by the said London and South African Exploration Company to the said claimholders, free from all control of the said Exploration Company, for the purpose of hauling sites, erecting machinery, and generally for the efficient and proper working of the claims in the said mine by the said claimholders.

That it was at the same time further agreed

between the said London and South African Exploration Company and the said claimholders that the said area so dedicated and set apart as aforesaid should be placed under the exclusive control and management (for the benefit of the said claimholders) of a certain Board of Committee of three persons, called the Depositing Sites Committee.

That thereafter it was agreed between the said claimholders and the London and South African Exploration Company that the plaintiff Board should be substituted for the said Depositing Sites Committee, and that the area so dedicated and set apart as aforesaid should be under the exclusive control and management of the said Board, and thereupon the said area was placed under the exclusive control and management of the said Mining Board.

That in or about May, 1890, the first-named defendant wrongfully and unlawfully, and without the consent of the said Mining Board, trespassed upon the area so set apart and dedicated as aforesaid, and erected certain washing machinery, and washed and continued to wash débris, the property of the said Mining Board, to the damage of the said Mining Board.

That the defendant, though often requested, refused to move the said machinery and to discontinue washing débris within the said area.

The plaintiff claimed:

1. £1,000 damages as aforesaid.

2. A perpetual interdict restraining defendant from trespassing as aforesaid.

3. General relief and costs of suit.

In his pleas, the defendant Armstrong, amongst other defences, justified the acts which were alleged in the declaration to constitute the trespass by virtue of certain agreements entered into by him with the London and South African Exploration Company, whereby, in return for valuable consideration, the said company authorised and permitted him to enter upon their said farm Bultfontein, to erect certain washing machinery thereon, and to wash and search for diamonds in the soil, situate upon the said farm and forming part of it.

[Subsequently the London and South African Exploration Company were allowed to intervene in the case as co-defendants.]

Both the defendants pleaded, *inter alia*, that Bultfontein had never been legally and validly declared and proclaimed to be a mine, and they denied that the Mining Board ever had been constituted under the provisions of Act 19 of 1883.

Further, even assuming Bultfontein to be a duly-proclaimed mine, the provisions of sections 34 and 39 of Act 19 of 1888 did not apply to this mine, inasmuch as it was situated upon land the title to which was not subject to a reservation of minerals or precious stones in favour of the Crown.

They also pleaded that the Mining Board was not vested by Act 19 of 1888 with the exclusive control and management of the mining area, so as to entitle the Board to restrain the owner of the soil from entering upon that area and using it for his own purposes

Upon these facts and pleadings issue was joined. The Court below held, *inter alia*, that the plaintiff had failed to prove that the Mining Board were vested by Act 19 of 1888 with the exclusive control and management of the mining area, or that they had the exclusive possession of the said area, and that it followed as a matter of course that the plaintiff could not claim that the débris which had been deposited in the mining area had become the property of the Board by virtue of their occupation of it as abandoned property. From this decision the appellant (plaintiff in the Court below) now appealed.

Mr. Schreiner, after stating the facts, said that he purposed to divide his argument into three parts:

1. The statutory rights of control and management conferred upon the Mining Board by Act 19 of 1888, section 34.

2. The confirmation of those rights by the promulgation of bye-laws.

3. The special agreement entered into between the Mining Board and the London and South African Exploration Company and the construction and effect of that agreement.

Mr. Schreiner then proceeded to discuss each of these points at length.

Mr. Juta was heard in reply.

Cur ad vult.

Postea (4th Aug.)

The Chief Justice gave judgment as follows: I entirely concur with the judgment of Mr. Justice Solomon, and with the reasons for his judgment. To prevent any misconception, however, I desire to add that, in affirming the judgment, this Court must not be considered as deciding that the Mining Board has no powers of control or management over the mining area of Bultfontein. What we do decide is that the powers which the Board does possess do not entitle the Board to relief in this action, without proof that the erection of machinery and the washing of débris by Armstrong within the mining area can or do interfere with the rights of the claimholders. I am very far from holding that if there had been an encroachment by Armstrong, even with the consent of the London and South African Exploration Company, upon the statutory reserve of 200 yards around the margin of the mine, the Board would have had no *locus standi* to apply for an interdict to

restrain such encroachment. It is admitted that the alleged trespass is beyond the 200 yards limit. In the same way there is nothing in the judgment which would justify the company in contracting the area required by the claimholders for mining purposes outside the mine, or in devoting such area to purposes not connected with mining purposes. The erection of machinery for washing purposes, and the washing of débris which came from the mine appear to me to be mining operations outside the reserve, which ought not to be restrained without proof that the rights and privileges of the claimholders are in any way affected thereby. It is true that the débris was not taken out of the mine by Armstrong, but there is nothing in the evidence to show that his possession of it was illegal. The declaration alleges that the débris belongs to the Mining Board, but there is not a particle of evidence to support this allegation, and there is nothing in the Act of 1888, which expressly or impliedly gives the Board the right to débris which has been abandoned by the claimholder who raised it. In regard to bye-laws, I agree with Mr. Justice Solomon that had any bye-law been passed to meet a case like the present the plaintiff would have been in a better legal position than he is at present. But in the absence of such bye-law I would not go so far as to hold that the Board has no *locus standi* to protect the rights of the claimholders in general where those rights have been infringed. The result of the absence of a bye-law is to throw upon the Board the burthen of proving that those rights have been actually infringed. The only other observation which I wish to make is that the main point decided by this Court in the case of the "London and South African Exploration Company v. Bultfontein Mining Company" (8 Juta, 55) was that, inasmuch as the portion of the mining area which the then defendants had trespassed upon had been reserved by the company as part of the mine itself, it could not be claimed by the adjoining claimholder as an expansion of the mine in terms of the 69th section of the Act of 1888. An additional reason for the judgment was that there had been no allotment of that portion by the Mining Board. I fail to see how this additional reason assists the Board in the present case. There is no allegation, much less proof, that the Board had duly allotted, the portion occupied by Armstrong to anyone else before he occupied it. If it had been so allotted, the allottee, if not the Board itself, would, I presume, have had a remedy against Armstrong. But the land appears to have been unoccupied, and in the absence of proof that the occupation by Armstrong does at present or will in future hamper the claimholders in their mining operations, and in the absence of any bye-law framed under the Act of 1888, authorising the Board to interfere in a case like the present, we are of opinion that the appeal must be dismissed with costs.

Their lordships concurred.

[Attorneys for Appellants, Messrs. van Zyl & Bussinne and Messrs. Scanlen & Syfret; Attorneys for Respondents, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

TUESDAY, AUGUST 4.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr Justice SMITH, and Mr. Justice BUCHANAN.]

CILLIERS V. PIENAAR AND WIFE.

Defamation of character—Action for damages—Exception to declaration as disclosing no cause of action.

Mr. Schreiner appeared for the plaintiff, and Mr. Searle for the defendants.

This case came on for argument on an exception taken by the defendants to the plaintiff's declaration.

The facts of the case are as follows: The plaintiff is a farmer, and resides with his wife at Bontebokfontein, in the district of Hanover, and the defendants reside at Niekerksfontein, in the district of Richmond. The declaration alleged that in the month of August, 1890, at Richmond, and on divers occasions, in the presence and hearing of one Jacobus Stephanus Grové, sen., one Jacobus Stephanus Conradie (brother of plaintiff's wife), and Christian Gert Conradie (father of plaintiff's wife), the defendant Barend Pienaar wrongfully, unlawfully, and maliciously spoke, published, uttered, and repeated in Dutch, of and concerning the plaintiff and his wife the following false and defamatory words or words, having the following effect:

"She (that is the plaintiff's wife) is badly treated by her husband (that is the plaintiff); Charl (that is the plaintiff) is very often absent; she does not know where he is or when he returns; she has to carry wood to the house with a child on her back; she has to fetch fuel-dung from the kraal to the house; that when she complains of having too little meal he gives her a small dish of meal, and says that she must manage with it; he treats her as a servant, but not as a man his wife; when her child was ill he allowed her to be fetched from Hanover by a Hottentot, who nearly

upset the cart; he treats her badly; he carries all the keys in his pocket, and everything in the house is locked up; if he had any affection for his wife he could hire a maid-servant for the work."

Further, that in or about the month of August or September, 1890, and at Richmond aforesaid, in the presence and hearing of Magdalena Elizabeth Conradie, mother of plaintiff's wife, the second-named defendant wrongfully, unlawfully, and maliciously spoke, uttered, published, and repeated in Dutch of and concerning the plaintiff and his wife the following false and defamatory words, or words having the following effect:

"She (that is the plaintiff's wife) is treated quite like a servant. Charl (that is the plaintiff) treats Nonnie badly, he had not even as much concern for her when her child was sick as to take her to a doctor, but he sent her with a Hottentot. Charl is well off, but madam should go and see how badly off madam's child is for clothing. Cilliers is too stingy to hire a maid-servant for her, yet she must work so hard that madam should ride over and go and take her child away. Were she my child I would not allow her to remain one day longer." By reason of the false, defamatory and malicious words aforesaid the plaintiff has sustained injury to his fair fame and reputation, and has sustained damages in the sum of £200 sterling."

The defendants excepted to the above declaration on the grounds that the words spoken were not defamatory, and that the declaration disclosed no cause of action.

Mr. Searle, in support of the exception, contended that the words referred to in the declaration were not defamatory, but were ordinary observations made about people who appeared to live a hard farming life. The words were at most ambiguous, and the Court under such circumstances would not infer malice. Counsel referred to Voet (47, 10, 8, and 47, 10, 10), and submitted that the plaintiff was a little too thin-skinned, and had taken offence at words which could not possibly have injured him, and which were the mere gossip of old women. The case was a trumpery one, and the defendants ought not to be put to the expense of defending it.

Mr. Schreiner: The Court has not to consider whether the case is a trumpery one or not. With regard to the statement that the plaintiff is too thin-skinned, my learned friend has displayed a knowledge of the superficial covering of my client which the circumstances do not justify. Serious charges had been made against the plaintiff that he had treated his wife badly, and had behaved towards her as if she had been a servant.

The Chief Justice: If the words used had been in writing could they have been the subject of a criminal prosecution?

Mr. Schreiner: No doubt the Attorney-General would exercise a wise discretion, and if he did not think they justified the issue of his fiat, he would recommend the civil remedy. It was impossible to hold that the words used were not malicious and defamatory.

The Court overruled the exception, costs to be costs in the cause.

PETITION OF MAY ALICE HATCH.

Funds in hands of plaintiff's attorneys—Application by defendant (wife of plaintiff) for a portion of funds to enable her to prepare defence granted.

Mr. Schreiner appeared for the petitioner, and Sir T. Upington, Q.C., for the respondent.

This was an application for an order authorising the payment to petitioner of a sum of money out of the funds in the hands of her husband's attorneys to enable her to proceed with her defence in an action instituted by her said husband to have their marriage declared null and void.

It appeared from the petition that the petitioner is the wife of Mr. G. Hatch, to whom she was married on the 1st February, 1886.

That on the 28th January, 1886, an ante-nuptial contract was executed between the parties, under the terms of which certain furniture and other effects were settled on the petitioner as a marriage settlement.

That on the 10th March, 1891, the parties executed a deed of separation wherein it was stipulated, *inter alia*, that the above-mentioned furniture should remain the property of the petitioner.

That on the 23rd March, 1891, the petitioner signed an acknowledgment of debt for £77 for value received in furniture (this being furniture then belonging to the respondent, and being quite distinct from that settled by him on the petitioner under the marriage settlement and deed of separation).

That on the 12th June, 1891, a summons was served on the petitioner, at the instance of the respondent, wherein he claimed:

(1) That the marriage should be set aside and declared void *ab initio*;

(2) custody of the child the issue of the marriage; and

(3) an order setting aside the marriage settlement.

That on the 17th June, 1891, a rule *nisi* was obtained, restraining the petitioner from selling the furniture pending the result of the action.

The furniture in question was, however, subsequently sold, and realised the sum of £181 2s. 1d. which amount is now in the hands of respondent's attorneys.

At the time Mr. Hatch married the petitioner (then a Mrs. Tadman) she was supposed to be a widow, she having as a fact received a letter from Mrs. M. A. Loft, her sister-in-law, to the effect that Mr. Tadman had died at Margate on the 1st May, 1885.

Mr. Hatch has, however, recently received information to the effect that Mr. Tadman is still alive, and on these grounds he is now bringing an action to have the marriage between himself and Mrs. Tadman (the petitioner) declared null and void.

The petitioner alleges that she has a good defence to the action, and asks for sufficient funds to enable her to undertake the defence.

The Chief Justice said that it was a matter of the utmost importance to the petitioner that she should prove the death of her former husband. There had been no *mala fides* on her part in entering on the second marriage, and she ought to have an opportunity of proving, if she could, her former husband's death. Under these circumstances the Court was of opinion that the sum of £50 should be paid to petitioner's attorney, to be administered by him as a trust fund to enable the petitioner to make the inquiries necessary for her defence. No order would be made as to costs.

HADJE MOCHAMAT JASSIEM AND OTHERS V. THE MASTER AND G. W. STEYTLER, (IN HIS CAPACITY AS EXECUTOR DATIVE OF THE ESTATE OF THE LATE ABDOL RAGMAN.)

Mr. Searle appeared for the applicants, Mr. Giddy for the Master, and Mr. Schreiner for Mr. G. W. Steytler.

The matter was ordered to stand over for further information

VAN ZYL AND OTHERS V. DE BEER'S EXECUTRIX.

Practice—Rule of Court 330 (*a*)—Pleadings—Bar.

Mr. Schreiner appeared for the applicant (defendant), and Mr. Searle for the respondents (plaintiffs).

This was an application calling upon the respondents to shew cause why judgment should not be entered against them, or why they should not be barred from proceeding with an action partly heard by the Court on the 17th March last (1 C.T.L.R., 78) (when the Court refused to grant the order or interdict applied for, restraining applicant from obstructing the flow of water from the farm Matroosfontein to Wittedrift, but allowed the notice of motion bearing date the 16th February, 1891, to stand as the summons), by reason that the said respondents had failed to proceed with their action by filing a declaration within the next term after that in which the action was commenced.

Mr. Schreiner, in support of the application referred to Rule of Court 330 (*a*), and contended that, inasmuch as the respondents had not complied with this rule, they were clearly barred.

Mr. Searle, for the respondents, submitted that the rule did not apply. Regard should be had as to when the matter was actually before the Court namely in March, in which case the respondents would have had till the end of the August term within which to file their declaration.

Counsel referred to the affidavit of Mr. E. H. van Noorden, from which it appeared that after the interdict had been refused the applicant sold the farm Matroosfontein to Mr. P. A. van Zyl, with whom an action is now pending, and that if Mr. Van Zyl succeeded in his action the case before the Court in March last would not be continued, and that it was in consequence of this fact that the action against applicant was not proceeded with.

Mr. Schreiner, in reply, said that the respondents should have acted reasonably. Applicant's attorney had written asking them if they intended to abandon the action, but no reply had been received.

The application was refused with costs.

SUPREME COURT.

WEDNESDAY, AUGUST 5.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

CLAREMONT AND OTHER MUNICIPALITIES V. OHLSSON'S CAPE BREWERIES.

Costs—Nuisance—Provisional Interdict.

Where on an application for an interdict restraining the continuance of a nuisance the applicants had shown sufficient cause for the granting of a provisional interdict but the matter was ordered to stand over, and a further application was subsequently made, but withdrawn on proof that the nuisance had been abated, costs were given the applicants on both motions.

Mr. Searle appeared for the applicants; Sir T. Upington, Q.C., and Mr. Juta for the respondents.

This case was before the Court on the 18th April last, when an interdict was applied for restraining the respondent company from discharging refuse matter into the Liesbeek River. The matter was allowed to stand over till the August term, on the company undertaking to remove the cause of complaint.

Mr Searle now applied for further extension of time, on the grounds set forth in an affidavit of Mr. Gibbs, who deposed that since the matter had been before the Court in April last he had inspected the underground drain (the chief cause of complaint) on thirty-five different occasions, and he found that the nuisance had been considerably abated, partly owing to the efforts of the company, and partly owing to the winter rains, but it was impossible for him at present to say whether the nuisance would be renewed in the dry season. Under these circumstances, the Municipalities did not at present feel justified in proceeding with the action.

In answer to the Court, Mr. Searle said that he was willing to consent to the order being discharged if the respondents paid costs, and on condition that application could be made again, say at the end of December, when it could be fully tested whether the nuisance was likely to continue or not.

Mr. Juta: The position taken up by my learned friend is an extraordinary one. The matter has been standing over since April last, when the question as to whether the applicants were entitled to an interdict or not was not discussed. Ever since the Municipalities have been endeavouring to get sufficient evidence to establish their case, and after having failed to do this, and abandoned their action, they ask us to pay costs. Surely the Court would not give costs in such a case; the most it would do would be to order each party to pay their own costs.

Mr. Justice Smith intimated that he did not intend to take part in the decision, as he was not present when the matter was before the Court on the last occasion.

The Chief Justice, in giving judgment, said that he thought it would be better for all parties if no further application were made to the Court unless there was proof that the nuisance continued. The only grounds upon which the Court would order the respondents to pay costs were that in the original application the Municipalities had proved that they were entitled to a provisional interdict. There had been a great conflict of evidence, but the medical testimony clearly showed that in April last a serious nuisance did exist. To prevent the stoppage of an important industry a provisional interdict was not granted, the respondents undertaking to do all they could to abate the nuisance. The Court was now, however, driven to give a decision as to what would have been the original order, and he (the Chief Justice) was bound to say that they would have granted a provisional interdict with costs. Under these circumstances, he was of opinion that the applicants were entitled to the costs of the original motion.

Mr. Searle: The order, I presume, includes the costs of to-day?

The Chief Justice: Yes.

Mr. Justice Buchanan concurred; and remarked that on the original motion the applicants were clearly entitled to a provisional interdict and costs.

WARD V. GERALD AND CO.

Mr. Shiel, on behalf of the applicant, applied for leave to sue *in forma pauperis* in an action about to be instituted by him against Gerald & Co., of Cape Town, for damages for breach of contract.

Referred to counsel for his certificate.

EATON V. EATON.

On the application of Mr. Tredgold, leave was given to extend the return day of the rule *nisi* until the last day of term.

LOTTER V. NDHLANGALAVA.

Mr. Juta appeared for the appellant (defendant in the Court below), and Mr. Graham for the respondent.

This was an appeal from a decision of the Resident Magistrate of Cathcart, given on the 21st May last, under the following circumstances: The plaintiff (present respondent), a native living in Keiskama Hoek, sued the defendant (present appellant) for the delivery of an ox alleged to have been forcibly taken possession of by defendant's son, who claimed the ox as belonging to his father. At the trial the defendant alleged that the ox was his, that he had lost the same six years before, and that he recognised it by its colour, and by certain marks on its body. The evidence as to the history of the ox was of a very conflicting character, the plaintiff stating that he had received the ox when it was a calf as part of a dowry for his daughter, whereas the defendant alleged that he had bred the ox, and that it remained in his possession until it was four years old when he lost it. The Magistrate gave judgment for the plaintiff, and from this decision the defendant now appealed.

Mr. Juta was heard in support of the appeal.

Mr. Graham was not called upon.

The Chief Justice, in giving judgment, said that it was impossible to interfere with the decision of the Resident Magistrate. The appellant had taken forcible possession of the ox, and the onus was on him to prove that the ox was his. He had failed to satisfy the Magistrate on this point, and under

these circumstances the decision of the Magistrate must be upheld and the appeal dismissed with costs.

[Attorneys for the appellant, Messrs. van Zyl & Buissinne; for the Respondent, Messrs. Fairbridge & Arderne.]

BAM'S EXECUTORS V. HAUPT.

Magistrate's jurisdiction—Exception—Act 20 of 1856, section 8.

Mr. Searle appeared for the appellants, and Mr. Molteno for the respondent.

This was an appeal from a decision of the Resident Magistrate of Stellenbosch, upholding an exception to the summons taken by defendant's attorney on the grounds that the Court had no jurisdiction. The plaintiffs (present appellants) in their summons claimed the delivery of ten leaguers of Cape brandy, valued at £130, or £20 damages, alleged to have been sustained by non-delivery of the brandy. The Magistrate gave the following reasons for upholding the exception: "The plaintiffs demand from the defendant the restoration of ten leaguers of brandy, valued at £130, which, on the face of it, is beyond the jurisdiction of the Court. Every opportunity was afforded the plaintiffs throughout to amend the summons by erasing the claim for delivery and simply to sue for damages. Plaintiffs having failed to do so, the Court had no other alternative but to dismiss the case on this exception." From this decision the plaintiffs now appealed.

Mr. Searle, in supporting the appeal, contended that the Magistrate had erred in upholding the exception, and that where in a summons, as in the present case, there were two prayers, one of which was beyond the jurisdiction of the Magistrate and the other within his jurisdiction, it was quite competent for him, within section 8, Act 20 of 1856, to give judgment on the latter prayer. If the amount claimed in the first prayer was beyond the jurisdiction of the Magistrate, he should have himself amended the summons; there was nothing in section 50 to prevent his doing so. Counsel referred to "Lindenberg v. Bosman" (Buch. 1870, p. 51), and "Taylor v. Haupt" (5 Juta, 22), and submitted that the Magistrate should have overruled the exception.

The Chief Justice, in giving judgment, said that there was no question as to the correctness of the Magistrate in upholding the exception, as the claim was clearly beyond his jurisdiction. Every facility had been given the plaintiffs to amend the summons by striking out the first part of the claim, but they had failed to do so.

The appeal must be dismissed with costs.

[Attorney for the Appellants, J. C. de Korte; for the Respondent, G. Montgomery Walker.]

SUPREME COURT.

THURSDAY, AUGUST 6.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

LOAN AND MORTGAGE AGENCY V. BRUHNS.

Mr. Tregold moved for provisional sentence on a mortgage bond for £1,100, with interest at 8 per cent. from 1st January, 1890.

Provisional sentenced granted and property declared executable.

WALKER V. DICKSON.

On the application of Mr. Jones, provisional sentence was granted for £30 in respect of professional services rendered.

SHAH OF PERSIA SYNDICATE, IN LIQUIDATION V. FROUD.

Mr. Shiel moved for provisional sentence for £15, less £5 paid on account since issue of summons, in respect of calls due on shares in the above-mentioned syndicate.

Provisional sentence granted with costs.

SHAH OF PERSIA SYNDICATE, IN LIQUIDATION V. SMART.

On the application of Mr. Shiel, provisional sentence was granted for £10, less £5 paid since issue of summons.

REHABILITATIONS.

On motion from the bar, the rehabilitation of the following insolvents was granted: William Adolph Joubert, D.son, James Hilling Miller, and Jan Rynhard Brister, J.son.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE THOMAS HALL.

On the application of Mr. Maskew, the Court made absolute the rule *nisi* for the cancellation in the Debt Registry of certain mortgage bond of £1,000 passed by the said Thomas Hall, since deceased, in favour of the insolvent estate of Frederick A. Boon, and ceded to Chas. S. Pillans,

PETITION OF MARIA J. WIDDOWSON.

Mr. Graham, on behalf of the petitioner, moved for leave to sue *in forma pauperis* in an action for debt against her husband.

Referred to counsel for his certificate.

In re J. N. KNOOP.

Mr. Juta applied for the appointment of a curator to take charge of the person of the alleged lunatic.

It appeared from affidavit that in the year 1881 the Court made an inquiry into the state of Knoop's mind, when the Court declared him incapable of managing his affairs, but declined to declare him of unsound mind.

The Court now ordered a fresh inquiry to be made, the evidence to be taken on affidavit, but one witness who had seen the alleged lunatic to be present in court at the hearing of the case.

The Resident Magistrate of the Paarl was appointed *curator ad litem*, and instructed to furnish his report to the Court.

BOTHA'S EXECUTORS V DEAS BROS.

Mr. Searle appeared for the applicants; Mr Molteno for the respondents.

The award of the arbitrators as to the subdivision of certain farm known as Vinknest, in the division of Oudtshoorn, was by consent made a rule of Court.

IN THE ESTATE OF THE LATE J. VAN HEERDEN.

Mr. Schreiner moved for authority to the executors to sell certain erf and building belonging to the estate in the village of Cradock, for the purpose of discharging claims, and further authority, in case the proceeds of such sale should not be sufficient, to mortgage the farm property to raise the balance.

The matter was referred to the Master to report generally as to the best course to be purused to meet the views of the executors.

HATCH V. HATCH.

Mr. Giddy applied for the issue of a commission to take the evidence of plaintiff's witnesses at Aliwal North before the Resident Magistrate.

Mr. Schreiner consented, and the application was granted.

In re THE ALBERT DISTRICT GOLD-MINING COMPANY, IN LIQUIDATION.

Mr. Searle presented the second report of the official liquidator of the above-mentioned company.

The Court made the usual order as to the report lying for inspection for fourteen days at the Master's Office, and at the office of the liquidator, and for publication in the *Gazette*.

REGINA V. PRINCE.

Appeal from sentence of Resident Magistrate—Exception—Act 21 of 1876, section 4—Non-compliance with terms of section—Appeal dismissed.

Mr. Juta appeared for the appellant, and Mr. Giddy for the Crown.

This was an appeal from the sentence of the Resident Magistrate of Robertson, passed upon the appellant on a charge of using threatening and abusive language likely to lead to a breach of the peace.

Mr. Giddy took exception to the *locus standi* of the appellant, on the ground that section 4 of Act 21 of 1876 had not been complied with.

It appeared from the record that the appellant had been convicted on the 20th April last, and that the written notice of intention to appeal had not been served on the Magistrate's clerk within four days after conviction, nor had the appeal been brought within forty-one days from the giving of notice as required by Act 21 of 1876, section 4.

The Court upheld the exception and dismissed the appeal, with leave to counsel to mention the matter again if satisfactory explanations could be given for non-compliance with the terms of the section.

[Appellant's Attorney, C. C. Silberbauer; Attorneys for the Crown, Messrs. Reid & Nephew]

THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. LAWRENCE.

On the application of Mr. Juta, leave was given to attach the agreement and one-third interest of the respondent in respect of the contract entered into between him and Messrs. Ward and Wessels in connection with the farms Oliphantsfontein and Benaauwdfontein *ad fundandam jurisdictionem* of this Court, in an action to be instituted to have it declared that the said bank is entitled to all the rights of the respondent therein.

The Chief Justice said that he hoped the liquidators were not taking this step in consequence of a remark which he had made in the judgment in the case of Coronel and Lawrence v. Ward and Wessels. That remark was not intended to induce the bank to bring an action.

Mr. Juta: The question has been submitted to counsel, and the liquidators are acting on his opinion.

IMROTH V. WARD.

Diamondiferous farm—Right to prospect and develop—Agreement—Cession—Recession—Rights and obligations of cedent.

Mr. Searle appeared for the applicant, and Mr. Juta for the respondent.

This was an application for an order restraining the respondent from impeding the applicant or his servants in prospecting, opening up, and developing the Premier or Wesselton Diamond-mine. On the 26th June last judgment was given in the case of "Coronel and Lawrence v. Ward and Wessels" (1 C.T.L.R., 167), and the Court on that occasion held that the plaintiffs were entitled each to the benefit of one-fourth of any rights acquired by Ward, by virtue of any agreement made by him with Wessels, with respect to the Wesselton properties. Prior to the hearing of the action Lawrence had ceded his interest in the agreement with Ward to Imroth, the present applicant. By virtue of this cession Imroth now claimed the right to go on the Wesselton Mine, and help to prospect and develop it. This right was, however, denied him by the respondent Ward, who claimed to have the exclusive privilege, under the agreement, of prospecting and developing the mine; hence the present application.

Mr. Searle: The applicant is entitled to all Lawrence's rights under the agreement with Ward, and those rights include the prospecting and developing of the mine. The applicant undertakes to account to Ward for all diamonds which may be found, but insists upon his rights under the cession.

The Chief Justice: Supposing Lawrence had ceded his rights to several persons, could they all have come on the farm?

Mr. Searle: Clause 4 of the agreement would have prevented him from doing that.

The Chief Justice: Does Ward object to the assignees coming on the farm to see how the work is progressing?

Mr. Searle: Ward does not say so, but he says that he himself intends to work and develop the mine in his own way.

After further argument,

The Chief Justice delivered the following judgment: Under the agreement with Wessels, Ward undertook certain responsibilities, and acquired certain rights, but he was also bound by certain obligations—thus by the agreement he has a sole and absolute right to prospect. (His lordship read the second clause of the agreement.) Ward is making his agreement with Coronel and Lawrence, took good care to secure to himself the right of prospecting. If he had given the right of prospecting to whomsoever he wished, he ran the risk of breaking his agreement with Wessels. Therefore, in ceding certain rights to Lawrence, he reserved to himself certain rights, and one of these was that he should develop and work the mine. (His lordship again referred to the agreement). Now, it is quite clear from the agreement entered into between Lawrence and Ward, in my opinion at any rate, that Ward should be the person to do the prospecting, and that Lawrence should have no right of doing so. But I am bound to say that if Lawrence can show that Ward is not acting in a *bona fide* manner, and is not doing his utmost for the benefit of all concerned, he might have some right to come here to compel Ward to do his duty or to enable Lawrence himself to do it. This is a kind of partnership, and each partner is bound to do his best for all concerned, and if there were any allegation of want of *bona fides* on the part of Ward, or of any slackness on his part in doing his best for the interests of the partnership, there might be some ground for moving the Court. There is, however, no such allegation, and under these circumstances the application must be dismissed with costs.

Mr. Justice Smith: I am of the same opinion. With regard, however, to the last part of the judgment. I have considerable doubt whether, even if Ward did not do his duty, the Court could interfere with the rights of Wessels.

Mr. Justice Buchanan concurred.

KOLLER V. ABAS.

Magistrate's jurisdiction—Act 20 of 1856, section 8—Title to land in dispute.

Mr. Searle appeared for the appellant, and Mr. Schreiner for the respondent. This was an appeal from a decision of the Resident Magistrate of Cape Town upholding an exception taken to the summons by defendant's agent, the exception being that the Magistrate had no jurisdiction inasmuch as "the title to property was in dispute." The facts of the case appear sufficiently from the Magistrate's reasons which are as follows: "The defendant is sued for a month's rent (£2 2s. 6d.) of a house and premises stated in the summons to be the property of the said plaintiff. The defendant says that the title to the property is in dispute, and produces a witness to prove that the property is still registered in the name of one Andrews (deceased), that Mr. Currey is the *curator bonis* in the said estate and claims the property, and that defendant has already paid him the rent in question. The title to the property being therefore clearly in dispute I hold that I have no jurisdiction."

Mr. Searle: The Magistrate erred in upholding the exception; he should have taken evidence as to

whether the dispute was *bona fide* or not. The respondent has paid rent for the past two years to the appellant, and in any case he cannot dispute the title of his landlord. To oust the jurisdiction of the Magistrate, the dispute as to title should have been between the parties before the Court, and *jus tertii* should not have been set up. The question was one of rent, and not of ownership. The case should be remitted to the Magistrate to be decided on its merits.

The Court held that a question of title was in dispute, that the Magistrate had no jurisdiction, and dismissed the appeal with costs.

[Appellant's Attorney, J. Hamilton Walker; Attorneys for the respondent, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

MONDAY, AUGUST 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice BUCHANAN.]

REGINA V. PUTSHU AND KLEKISO.

On the application of Mr. Giddy, the venue was changed from the Supreme Court to the Circuit Court, King William's Town.

HEINAMANN V. HEINAMANN.

Mr. Juta appeared for the plaintiff; the defendant in default.

This was an action for restitution of conjugal rights, instituted by the plaintiff, Mrs. S. Heinamann, against her husband, by reason of his desertion.

The parties were married in 1866, and in 1886 the defendant left his wife and has since refused to return to her.

The marriage having been proved, and formal evidence given by the plaintiff, the Court ordered the defendant to return to his wife or receive her on or before the 31st August instant, failing compliance with which order to show cause, on the 12th September, why a decree of divorce should not be granted.

[Plaintiff's Attorney, H. P. du Preez.]

SUPREME COURT.

WEDNESDAY, AUGUST 12.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

Slander—Action for damages—Privileged communication—Social duty.

CILLIERS V. PIENAAR AND WIFE.

Mr. Schreiner and Mr. Jones appeared for the plaintiff, and Mr. Searle and Mr. Molteno for the defendants.

This was an action for slander, damages being laid at £200.

The facts of the case and the particulars of the alleged slander appeared on the 4th inst., (*Ante* p. 194) when the arguments on the exception were heard.

Mr. J. S. Grové, sen., examined by Mr. Schreiner, stated that he was the grandfather of plaintiff's wife. He knew the Pienaars. In August last the first-named defendant came to his house in Richmond, and spoke to him as to the condition of things between Cilliers and his wife. He told him (witness) that Cilliers treated his wife badly, and as though she were a servant. Pienaar also said that he had a message for Mr. Conradie, sen. (the father of plaintiff's wife), and that Mr. Conradie must fetch his daughter away. Witness was seventy-seven years old, and did not remember all the details of the conversation. He (witness) did not go himself to Mr. Conradie, sen., in consequence of the conversation with defendant, but he told young Mr. Conradie about the matter.

Cross-examined by Mr. Searle: The conversation referred to took place at his (witness's) house. Mr. and Mrs. Pienaar were friendly with the Conradies. He knew that Pienaar had just returned from Hanover, and he had heard that inquiries had been made about the illness of Cilliers's child. He only spoke of the conversation to young Conradie.

Mr. Conradie, sen., examined, stated that he lived in the division of Richmond. His son told him of a conversation he had had with Mr. Grové about Cilliers and his wife, and in consequence of what he heard he (witness) asked Pienaar to come to his house. Pienaar came, and on his arrival witness told him that he had heard that he (Pienaar) had a message for him. The defendant said "Yes." Barend Stevens had told him that Cilliers treated his wife badly, that he made her work like a servant, and that he frequently went away without telling his wife where he was going,

and added that if Mrs. Cilliers were his child he would not allow her to remain a day with Cilliers. [At this stage of the case certain documents were put in which had been drawn up by the Rev. Mr. Moorrees with a view to settling the dispute between the parties.]

Cross-examined: He had known Mr. and Mrs. Pienaar a long time. He did not at first think that Pienaar was actuated by malice when he spoke to him about his daughter, Mrs. Cilliers. Witness had asked Pienaar to send him a telegram from Hanover regarding the condition of Mrs. Cilliers's child. He could not say if Pienaar knew Cilliers and his wife. Stevens had practically confirmed what Pienaar had told him.

Mr. J. S. Conradie, jun., gave the substance of the conversation that passed between himself and Mr. Grové.

Mrs. M. M. E. Conradie (mother of plaintiff's wife) stated that she had a house in Richmond. One Sunday in August or September last she was in Richmond, and attended church in the morning and afternoon. She walked home from church in the afternoon with Mrs. Pienaar, who told her that she had lately been to Hanover, and had heard that her grandchild was ill, and that her daughter, Mrs. Cilliers, had a very hard time of it with her husband, and that she (witness) ought to drive over, and not leave her child with Cilliers a day. In consequence of what Mrs. Pienaar had told her she was very much distressed.

Cross-examined: She did not see Mrs. Pienaar very often, but they were good friends, and she had no reason to believe that Mrs. Pienaar entertained any malice towards her or her family.

Mr. Cilliers, the plaintiff, examined by Mr. Schreiner, stated that he had heard the reports which had been circulated as to the manner in which he treated his wife; they were absolutely false, and previous to the occasions in question nothing had ever been said as to his character as a husband. He had been seriously damaged by these reports. He had lost his good name. He was ashamed to visit his friends, and he had been deprived of his privileges in church.

The Chief Justice: How so?—I have not been able to receive the Sacrament.

The Chief Justice: Why?—Because one of the elders of the Church told me I could not.

The Chief Justice: You were not prevented from receiving the Sacrament because of the report that you had ill-treated your wife?—I was told I could not receive the Sacrament by reason of my dispute with the Pienaars.

The Chief Justice: A very indirect consequence indeed.

Continuing, witness said that his wife always knew where he was going when he left home.

Cross-examined by Mr. Searle: He knew Pienaar and his wife by sight. He was under the impression that Pienaar had some ill-feeling against him, or he would not have spread the reports which he did. He first began the action against Barend Stevens, but it was dropped because he had not sufficient evidence. His father had not urged him to bring the action, nor was he providing the funds.

Mrs. Cilliers (the plaintiff's wife) stated that there was no truth in the reports that her husband treated her badly.

Mr. Cilliers, sen., deposed that he had no interest in the case further than sympathising with his son.

Mr. and Mrs. Pienaar, the defendants, were examined, and stated that they had simply given the substance of a conversation which they had had with Barend Stevens, and denied that in doing so they had been actuated by malice or ill-feeling.

Mr. Schreiner, for the plaintiff, contended that the statements made by Pienaar to Mr. Grové and Mr. Conradie were malicious.

The Chief Justice: Considering that Pienaar was a relative—though a distant one—of the Conradies, and supposing that he believed that the reports which he had heard were true, did not a social duty devolve upon him of informing Mr. and Mrs. Conradie of what he had heard, and was this information not privileged?

Mr. Schreiner: No; by marriage the husband becomes the guardian of his wife and privilege cannot be pleaded against him.

After further argument, the Court delivered judgment.

The Chief Justice said: There has been no very great conflict of evidence in this case, but even if there had been I should be inclined to believe the evidence of the defendants, and no amount of ingenuity can extract malice from the words which they admit they used and which they assert they heard from Mr. Barend Stevens. In my opinion, a social duty devolved upon the defendants to tell the Conradies what they had heard about their daughter, and I believe that that communication was privileged. [His lordship here referred to the case of "Fick v. Watermeyer," (Buch. 1874, p. 86), in which a letter written by the defendent to his father-in-law reflecting on the plaintiff, who was engaged to be married to a lady, a connection of the defendant's, in consequence of which letter the marriage was broken off, was held by a majority of the judges, the Chief Justice dissenting, to be a privileged communication.] Continuing, the Chief Justice said that he did not believe that Mr. Cilliers ill-treated his wife, nor did he believe that the defendants had been actuated by malice in repeating what they had heard from Stevens. The essence of slander was *animus injuriandi*, and as there was no evidence of this *animus* on the part of the defendants he was of opinion that they were entitled to judgment with costs.

Mr. Justice Smith: I am of the same opinion, and I am further of opinion that a social duty did devolve upon the defendants of informing the Conradies what they had heard respecting their daughter.

Mr. Justice Buchanan: I am of the same opinion, and I believe that the defendants were actuated by perfect *bona fides* throughout, and I agree that a social duty did devolve upon them of communicating to Mrs. Cilliers's parents what they had heard about her.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

THURSDAY, AUGUST 13.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

MARITZ VS. DELPORT.

On the motion of Mr. Tredgold, provisional sentence was granted on a mortgage bond for £300 with interest at 8 per cent from the 1st January 1891.

FLETCHER AND CO. VS. LE SUEUR.

Insolvency — Application for compulsory sequestration—Act 38 of 1884, section 3—Notice of intention to surrender—Schedules not filed—Mistake—*Locus poenitentiæ*—Provisional order discharged.

Mr. Juta appeared for the plaintiffs and Mr. Schreiner for the defendant.

This was an application for the compulsory sequestration of the defendant's estate. The provisional order was granted on the 14th July last. The defendant is indebted to the plaintiffs on a promissory note due on the 1st September next for the sum of £113 19s. 6d. On the 2nd July last judgment was granted against the defendant for £27 18s. 5d., and in pursuance of that judgment a writ of attachment was issued against his movable property. Subsequently, on the 3rd September, the defendant caused a notice of his intention to surrender his estate to be published in the *Government Gazette*. Defendant alleged that he was exceedingly doubtful at the time he caused the notice to be inserted in the *Gazette* whether his estate was solvent, and it was not until he had prepared his schedules that he found out his real position, when after a careful valuation he discovered that his assets exceeded his liabilities to the extent of £71 6s. 9d., under which circumstances he did not file his schedules in the Court of the Resident Magistrate as advertised. On these grounds he asked that the provisional order should be set aside, and that he might be allowed to liquidate his business for the benefit of all his creditors.

Mr. Schreiner: Although the plaintiffs are entitled under Act 38 of 1884, section 3, to make the present application, still the Court would take notice of the fact that the promissory note will not be due until 1st September. The defendant inserted the notice in the *Gazette* under the impression that he was insolvent, but when he came to value his assets he found that they exceeded his liabilities by £71 6s. 9d. Under these circumstances no judge would accept his voluntary sequestration, and his reason for not filing his schedules is thus satisfactorily explained. The provisional order should be discharged.

Mr. Juta: The defendant is insolvent. The value which he has placed on his assets is much higher than could be realised if they were sold at current market prices. One creditor has already obtained judgment against him for £27, and this amount has not yet been paid. Other creditors will probably get judgments for their claims; to satisfy these judgments the stock will be attached and sold, and when the promissory note falls due on the 1st September, there will probably be no assets to meet the plaintiffs' claim. This is such a case as the Act contemplates, and final sequestration should be ordered.

The Chief Justice, in giving judgment, said the principle upon which the Court had always acted is that there should be clear proof of insolvency. When the application for the provisional order was made there was sufficient proof that the estate was insolvent. The defendant, subsequent to the notice in the *Gazette* of his intention to surrender, discovered that he had made a mistake, and that his estate was really not insolvent, and thereupon exercised his *locus pœnitentiæ*, as he had a right to do. The defendant appeared to have acted *bona fide* throughout, and he ought not to suffer for a mistake which had been made in perfect good faith. Under these circumstances, he was of opinion that the provisional order should be discharged, on condition, however, that the defendant paid the costs of the proceedings. Leave would be given to the plaintiffs to apply again if the costs were not paid within a reasonable time.

In re J. N. KNOOP, A LUNATIC.

Mr. Juta appeared for the plaintiff. This matter, which was partly disposed of on the 6th inst., came on for further hearing. The affidavits of Dr. Hofmeyr and Mr. Dreyer and the report of the *curator ad litem* having been read, the Court declared J. N. Knoop to be of unsound mind, and appointed his brother-in law, Mr. H. C. Dreyer, curator of his person, with permission to the Master to pay £10 per month for the maintenance and clothing of the lunatic, and to have him examined periodically by a doctor.

[Plaintiff's Attorney, C. C. de Villiers.]

REHABILITATIONS.

On motion from the bar, the rehabilitation of the following insolvents was granted: Louis Stephanus Leasing and Nicholas Stephanus Coetzee, J.P.son.

COUSSMAKER V. THE GRIQUALAND WEST BOARD OF EXECUTORS.

Cause—Application to remove trial from Supreme Court to High Court—*Dominus litis*—Right of to select his own tribunal.

Mr. Juta appeared for the applicants (defend ants), and Mr. Schreiner for the respondent (plaintiff).

This was an application by the Griqualand West Board of Executors to have the above-mentioned cause removed for trial from the Supreme Court to the High Court of Griqualand West. The applicants based their application on the facts that considerable expense and inconvenience would be saved by the case being heard in Kimberley. They stated in their affidavit that if the case should be heard in Cape Town it would be necessary for the secretary, and probably certain other officers of the company, to appear and give evidence at the trial. That all the witnesses for the company reside in Kimberley. That it would be necessary that various books of account, letter books, and other documents should be produced, and that the removal of these from Kimberley to Cape Town, and the absence of officers of the company during the hearing of the case, would cause very considerable inconvenience and great expense. That during the hearing of the case numerous references would have to be made to the cause of the Board of Executors v. Crouch and Crouch, which was heard before the High Court on the 2nd September, 1890, with the details of which cause the judges of the High Court are conversant; and that therefore it would be more desirable that the case should be heard before the High Court. Finally, that the applicants had made inquiries and found that the plaintiff was not in a position to pay the costs of the action in the event of her being unsuccessful, and that consequently in any event the Board of Executors would have to pay the costs and expense of the law-suit, and that such costs and expense would be very much greater if the cause should be heard in the Supreme Court.

In answer to the above, Mr. Schreiner read the affidavit of the plaintiff's attorney, Mr. J. Hamilton Walker, which was to the effect that it would be undesirable to have the cause removed to the High Court. That the plaintiff resides in East London, and that the removal of the case would save little or no expense, but would put plaintiff, who is not young, to additional expense and great personal inconvenience. That the matters at issue are as much questions of law as of fact, and would be more properly dealt with by the Supreme Court than by the High Court, inasmuch as such a course would prevent all chance of the expense of an appeal from the High Court being incurred. That almost all the evidence on behalf of the defendants must be documentary, and very few witnesses would be required.

Mr. Juta was heard in support of the application.

The Chief Justice said that the general principle was that the plaintiff was the *dominus litis*, and as such had the right to select his tribunal, unless the defendant showed that the balance of convenience was in favour of the case being heard elsewhere. In the present case, the Board of Executors had not shown that there would be a balance of convenience in removing the case to the High Court, and consequently he was of opinion that the application should be dismissed; the question of costs to be reserved.

SUPREME COURT

FRIDAY, AUGUST 14.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

NEL AND OTHERS V. LIND AND ANOTHER.

Mr Searle and Mr. Graham appeared for the applicants (defendants), and Mr. Schreiner for the respondents (plaintiffs).

This was an application on behalf of the defendants in the action, for an order removing

the bar filed by the plaintiffs and for leave to the defendants to file their plea.

After argument, the Court ordered the bar to be removed. If necessary, the case could be set down for the 10th September in the event of its not being heard this term.

MULLER'S EXECUTORS V. THE ARGUS COMPANY, LIMITED.

Company—Agreement to purchase property—Resident Director—Power to bind Company—Servitudes.

Mr. Schreiner and Mr. Graham appeared for the plaintiffs, and Mr. Searle and Mr. Shiel for the defendant company.

This was an action instituted by Mr. Sybrand Jacobus Muller and Mr. Cornelis Johannes Muller (in their capacity as the executors dative of the estate of the late Gysbert van Reenen Muller), against Mr Francis Joseph Dormer and Mr. Thomas Sheffield (in their capacity as the trustees for the time being of the Argus Printing and Publishing Company (Limited), for the sum of £2,500, being the purchase price of a certain store, situated in Burg-street, Cape Town, with interest from the 30th June, 1891.

The declaration alleged that on or about the 13th April, 1891, an agreement was entered into between the parties to the suit through their duly-authorised agents, whereby the plaintiffs agreed to sell and the defendants agreed to buy the said property, then in their (the defendants) occupation, for the sum of £2,500 sterling. (By the terms of the lease the defendants had the option of buying the entire block for £6,000.) That it was thereafter specially agreed that the said price should be paid in cash upon separate transfer being effected of the said property by the plaintiffs to the defendants in due and customary form of law, which transfer the plaintiffs had tendered, and now again tender to give. That the defendants neglected and refused to pay the said sum of £2,500, with interest, as aforesaid. That the defendants were, as purchasers, also liable in accordance with the reasonable custom in that behalf established, in the absence of any stipulation to the contrary, for the expenses of transfer and conveyance of the said property, including transfer duty and survey expenses. Wherefore the plaintiffs prayed for a judgment for: (*a*) The said sum of £2,500 sterling, with interest from the 30th June, 1891, subject to transfer and conveyance of the said property to the defendants in due and customary form of law; (*b*) a declaration that the defendants were liable for the expenses of transfer and conveyance, including transfer duty and survey expenses, or that they should have such further or other relief as to this honourable Court might seem meet, together with costs of suit.

The defendants in their plea denied that any completed and concluded sale ever took place between them and the plaintiffs, but admitted that they were willing that such a sale should take place, provided that satisfactory terms and conditions as to the sale and payment, and exercise of servitudes in respect of the said store and the adjoining property, now in possession of the Diocesan trustees of the Cape Town Diocese, could be arranged. That no such servitudes had been agreed upon between the plaintiffs and the defendant company, nor had the said servitudes in respect of the said properties been agreed and determined upon between them. They admitted that the custom referred to in the declaration was a reasonable one, but denied that they were liable to the plaintiffs in respect of any sum by virtue thereof, on the ground that no completed and concluded sale had ever taken place between them and the plaintiffs. Upon these facts and pleadings issue was joined.

Mr. H. A. Bidewell Edwards, examined by Mr. Schreiner, stated that he was a broker residing in Cape Town. In the early part of the year he was instructed by the Diocesan trustees to try and buy Dr. Anderson's house in Burg-street. He saw the plaintiffs on the subject and learned from them that the Argus Company had the option of buying both the house and the store which they were occupying for £6,000 until the expiration of their lease in December, 1892. Witness then saw Mr. Powell, the company's resident director, and suggested to him that the company should buy the premises which they were then occupying for £2,500, and informed him at the same time that the Diocesan trustees were anxious to buy the remainder of the property, and were ready to do so if his company would abandon their right of purchase. Mr. Powell agreed to this, and subsequently wrote the letter of the 7th April. (The following is the letter referred to):

April 7.

Messrs. Bidewell Edwards & Co.

DEAR SIRS.—Referring to the purchase of the Burg-street store leased to this company, as to which I have had some verbal discussion with you, I am authorised by our head office to say that we will give £2,500 for the store, and upon condition Messrs. Muller selling us the store for that amount will forego the option to which we are entitled under the lease of purchasing the whole block, including Dr. Anderson's house, for £6,000. —Yours faithfully,

EDMUND POWELL, Resident Director.

Witness then saw his clients and the plaintiffs, and the transaction was completed,

On the 18th April witness wrote to Mr. Powell accepting the offer of the company, and handed the letter to Mr. Powell. Witness also prepared a broker's note for the Diocesan trustees, and on this note it was stipulated that the defendant company should have access to the passage between the two buildings for the purpose of repairing and painting their outer wall. Nothing further was said by Mr. Powell with regard to any other conditions or servitudes.

Cross-examined by Mr. Searle: He never tendered two broker's notes to Mr. Powell which the latter declined to accept. He did show a copy of the broker's note given to the Diocesan trustees to Mr. Van Zyl and asked him if he approved of it, but he never asked him to initial it. He was positive he handed his letter of the 18th April to Mr. Powell in his office. Towards the end of April he saw Mr. Dormer; the question of the sale was not discussed. He presented no broker's notes to Mr. Powell, as he considered that the letter of the 7th April was sufficient.

In answer to the Chief Justice, the witness said that in some sales of property, especially in the country, no broker's notes were passed.

Mr. H. T. Standen, of the firm of Wessels & Standen, stated that he acted as attorney for the Diocesan trustees, and prepared the transfers of the property in dispute. The condition as to the access to the passage between the building was approved of by the trustees at the suggestions of the Messrs. Muller. (The witness then described the passage between the buildings and the position of the windows in the store occupied by the company.) Continuing, witness said that when he saw Mr. Powell about the terms of payment the latter said that the sale had not yet been completed, as no broker's notes had passed. Witness said that the sale was sufficiently proved by the correspondence. Subsequently the Bishop of Cape Town, Mr. Powell, and witness inspected the premises, and certain conditions were submitted for the acceptance of the defendant company.

Cross-examined by Mr. Searle: Witness saw Mr. Dormer towards the end of April, but their interview had reference merely to the terms of payment, as the Mullers were willing to accept £1,000 cash and allow the balance to remain on mortgage. The Diocesan trustees were not forcing this action. They were anxious to get transfer, but they had nothing to do with the present action.

Mr. C. J. Muller, one of the plaintiffs examined, stated that the store in dispute was let on lease to the Argus Company. Mr. Edwards had an interview with him with regard to purchasing Dr. Anderson's house for the Diocesan trustees, but witness told him that he and his brother had determined to sell the two properties together, and that they wanted £5,000. Subsequently Mr. Edwards showed him Mr. Powell's letter of the 7th April, and from that he concluded that the sale had been effected. On the 18th April he saw Mr. Powell in his office, and showed him the condition as to access to the passage, and Mr. Powell expressed his satisfaction. Witness was sure that on this occasion Mr. Powell said he had received Mr. Bidewell Edwards's letter of the 13th April. At this interview nothing was said as to light.

Cross-examined: He did not go to Mr. Powell's office on the 18th April because there was a hitch in the sale. The general custom was that the seller and buyer paid the brokerage between them. He could not explain why nothing had been said to the Argus Company about brokerage.

Mr. Sybrand Muller, the second plaintiff, corroborated the evidence of last witness with regard to the interview at Mr. Powell's office, and stated that the only interview he had had with Mr. Dormer had reference to the terms of payment.

Mr. Edmund Powell, examined by Mr. Searle, stated that he was the resident director of the company, that the head office was in Johannesburg, where the managing director, Mr. Dormer, resided. He had negotiated the lease with Mr. Muller, after having received authority from his Board of Directors. Mr. Bidewell Edwards came to him in January last, and told him that he had a good, solid customer for Dr. Anderson's house, but that he could do nothing unless the Argus Company waived their option of purchase. Witness told him that he could not act on his own responsibility, but that he would wire to Johannesburg on the subject, which he accordingly did. Some few days after Edwards called again, and witness showed him a wire which he had received from Mr. Dormer, giving him authority to buy the store for £2,500. On the 7th April Edwards again called, and pressed witness for a document showing that the company were willing to waive their option of purchase. Witness then gave him the letter of the 7th April, but distinctly told him that that letter was given to him subject to conditions and terms regarding the sale. A day or two afterwards Edwards returned and said, "It is all settled. I have sold the property. Here is the broker's note." Witness was very much surprised, and refused to accept the broker's note or to admit that the sale had been completed as far as the company was concerned. Some few days afterwards Edwards again came to him and told him that he had secured a servitude for the company which would give them access to the passage. Witness remarked that it was an excellent condition, and would be considered with the other conditions of sale. Witness would swear positively that he never received the letter of the 13th April, nor did he ever give utterance

to the words alleged to have been spoken by him by Mr. Edwards. In fact, he had never heard of the letter until he had received the attorney's "notice to produce."

Mr. F. J. Dormer, managing director of the company, stated that he arrived in Cape Town about 20th April. Shortly after his arrival he had an interview with Mr. S. Muller regarding the terms and conditions of sale. Mr. Muller remarked that "the matter was all settled." Witness replied that "it was not all settled," as no understanding had been arrived at regarding the conditions. Muller then said that Edwards had told him that the affair had gone through, but he would see his brother about the matter, and let witness know. Witness remarked that he would only be a few days in Cape Town, and he should like the matter settled before he returned to Johannesburg. Witness subsequently saw Mr. Muller, but he could get nothing definite out of him. The company were prepared to complete the sale and take transfer at once if the question of lights could be satisfactorily settled. The store would be practically useless if the windows looking out on the passage were closed up.

The further hearing of the case was postponed.

SUPREME COURT.

MONDAY, AUGUST 17.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr Justice BUCHANAN.]

MULLER'S EXECUTORS V. THE ARGUS COMPANY.

Mr. Schreiner and Mr. Graham appeared for the plaintiffs, and Mr. Searle and Mr. Shiel for the defendant company.

The further hearing of this case, which was partly disposed of on Friday last, was resumed.

Mr. T. J. Anderson, examined by the Court, stated that he remembered seeing Mr. Powell, about the hitch in the negotiations regarding the sale of Muller's property, as he, witness, was anxious to get transfer of the Anderson property for the Diocesan trustees.

In answer to the Court, witness said that he could not remember from his conversation with Mr. Powell whether the latter had given him to understand that a sale of the property had actually been concluded between the Mullers and the Argus Company.

Mr. Searle, for the company, contended that they could not be bound by the letter of the 7th April, as that letter had been given for a specific purpose, namely, to show the Diocesan trustees that the company were willing to forego their option of purchasing the entire block, and that Mr. Bidewell Edwards well knew the purpose for which that letter was given. Mr. Powell had sworn positively that he had never received the letter of the 18th April, and the only explanation he (counsel) could give for the conflict of evidence on this point between Powell and Edwards was that the latter had left the letter at the *Argus* office, and that it had never reached Mr. Powell. The company had always been ready and willing to complete the transaction if the question of light could be satisfactorily arranged. Light was of the utmost importance to the defendants in their business, and if they were deprived of it they would sustain serious loss and inconvenience.

The Court, without calling upon Mr. Schreiner, delivered judgment.

The Chief Justice said: In this case the question has not been raised on the pleadings whether or not Mr. Powell had authority from the Argus Company to enter into a contract with the Mullers for the purchase of the store in Burg-street. The question was, however, incidentally raised during argument, but it cannot for one moment be contended that Mr. Powell had no authority, in the face of the telegram sent to him as far back as the beginning of February from the head office in Johannesburg, stating: "You may arrange for £2,500." A free hand was given him, and accordingly communications subsequently took place between Mr. Powell and Mr. Bidewell Edwards, in consequence of which, on the 7th April, Mr. Powell wrote the following letter to Mr. Edwards. [His lordship here read Mr. Powell's letter to Mr. Bidewell Edwards.] Now Mr. Powell in his evidence has candidly admitted that although this letter was addressed to Bidewell Edwards it was done so with the knowledge that it would be shown to the Mullers for the purpose of getting their consent to the sale. The letter was shown to the Mullers, and there can be no doubt that after they had consulted with Mr. Edwards they came to the conclusion that they should sell this property to the Argus Company, and that they saw the letter which Mr. Edwards intended to send to Mr. Powell, accepting the offer. That letter is as follows: "Dear Sir,—I beg to inform you that I have submitted your written offer of £2,500 for the store now occupied by you to Messrs. Muller, and I am requested to say that they accept the same." Now, if this letter was presented to Mr. Powell, there can be no doubt there was a concluded sale. It might have been necessary still to settle as to terms of payment, whether cash or bond, but in the absence of any settlement as to those terms, it is quite clear that by law cash would have to be

paid by the purchaser on transfer. Mr. Powell, however, says he did not receive the letter. Well, in this conflict of evidence, I am inclined to believe that Mr. Powell was mistaken—not wilfully mistaken—but in the press of work he may have forgotten that this letter was shown to him, and left with him; further, I incline to that belief because it is confirmed by the rest of the evidence in the case. But I think the case may be decided independently of this letter, because there is sufficient evidence of an acceptance by Mr. Powell's communication to the Mullers, for on the same day this letter was written the Mullers called on Mr. Powell, and I am satisfied from their evidence that they clearly understood that there was an acceptance; that Mr. Powell knew his offer had been accepted by them; and their position and Mullers' position was this, that they were bound by the contract, and if Mr. Powell had then insisted on the Mullers giving the transfer of the property to the Argus Company, the Mullers could not have got out of it. They were sufficiently bound by what had passed to look upon this as a concluded contract of sale. That being so, if the Mullers were bound, it is equally clear that the Argus Company were equally bound by what had passed. Now the evidence of the Mullers is fully supported by the rest of the evidence, oral and written; but I must say I am somewhat surprised that the case should have been defended at all, for if the defendants had recollected the terms of a letter written to Mr. Steytler on May 27 it would have been found that it is simply conclusive of the whole case. On Friday, and after Mr. Dormer had arrived, Mr. Powell wrote to Mr. Steytler: "Dear Sir,—I should feel greatly obliged if you will advise me of the date on which transfer is passed of Mullers' store, so that we may make provision for the insurances. It is understood to be a condition of the sale that we have free access at all times to the adjoining premises for the purpose of repairs of our own." That is the very condition appearing on the broker's note handed to the Diocese, and which the plaintiffs' witnesses say had been shown to Mr. Powell. There is no evidence whatever of any other condition having been agreed upon. "I presume," added Mr. Powell, "it will have to appear in the transfer of Messrs. Muller to the Diocese." That is the only condition Mr. Powell presumes will have to be understood. It is possible there may have been a mental reservation on his part on the 7th April, but unless his mental reservation was communicated to the Mullers, they were justified in concluding it was an out-and-out offer; and when they accepted it unconditionally there was a concluded contract to sell, by which the defendants are bound. It is not necessary to go into the question of servitude. It may well be that by common law there would be a condition imposed on the seller, not to deprive the purchaser of his light, but that question has not been raised The only defence is that there was no completed contract of sale, and as to that contract, I am perfectly satisfied it was completed. It is possible there may be a servitude of necessity, or a right to lights arising out of a servitude of necessity, but that does not arise now. If, hereafter, the Diocese should block up the lights of the company, it will then be time enough to prevent it if there is a servitude existing. I do not quite see how all the lights could be blocked up in the face of the servitude which the Diocese is willing to have inserted, namely, that the Argus Company has a right to have free access to the passage between the two buildings. I trust there will be no difficulty on the part of the plaintiffs and the Diocese in giving this servitude, which was originally arranged and endorsed on the broker's note; and on this understanding I think judgment should be for the plaintiffs with costs.

Their lordships concurred.

[Plaintiffs' Attorney, C. C. de Villiers; Defendants' Attorneys, Messrs. van Zyl & Buissinne.]

CURTIS V. DAY.

Debt—Action for—Pleadings—5th Rule of Court—Exceptions.

Mr. Molteno appeared for the plaintiff, and the defendant in person.

This was an action for £50 alleged to be due under the following circumstances, as detailed in the declaration: Early in March last the plaintiff handed to the defendant for collection a promissory note for £60, dated 5th January, 1891, payable fourteendays after date, signed by one Edgar Perkins in favour of one Luscombe Searelle, who duly endorsed it to the plaintiff. About the 4th March Messrs. Barnard Bros., of Kimberley, paid the defendant the sum of £50 on account of Edgar Perkins in reduction of the abovementioned promissory note. Thereafter the defendant surrendered the said promissory note, but refused to pay plaintiff the £50, and in consequence of such refusal the present action was brought.

Defendant in his plea admitted that a promissory note had been handed to him for collection, but denied that he held the said note on behalf of the plaintiff. Defendant further pleaded that in the month of March last the plaintiff handed to him a certain promissory note for £60, drawn by one Edgar Perkins in favour of Luscombe Searelle, for collection, provided £650 was paid to defendant by one Mons. D'Arc, who had arranged and agreed to pay the said sum to defendant, who held

Edgar Perkins's power of attorney, to receive and disburse same on his (Perkins) behalf. That under the said agreement defendant received from D'Arc the sum of £300 only, part of which defendant used to pay debts owing to his creditors by Perkins.

Irrelevant pleas were also raised by the defendant, and finally he pleaded the general issue.

Mr. Molteno excepted to the plea on the following grounds: (1) That the plea had not been signed by an advocate of the Supreme Court, in terms of the 5th rule of Court; (2) that the plea was vague and embarrassing, and did not set out in order the defence, and that the general issue had been pleaded.

The Court overruled the first exception, on the grounds that rule 5 had been considerably modified by practice, and that it could not have been intended that, when a defendant elected to conduct his own case, he should not be allowed to do so. With regard to the second exception, the Court intimated that they would hear the evidence before expressing an opinion on it.

Mr. Richard Curtis, the plaintiff, examined by Mr. Molteno, stated that in December last Mr. Searelle was in Cape Town and Perkins in Port Elizabeth. The latter wanted money to bring the company to Cape Town. Witness spoke to his principal, Mr. Searelle, about the matter, and Mr. Searelle advanced £260. Of this advance £100 was repaid to Mr. Searelle, and two promissory notes for £60 each were to be paid to witness, and he was to forward the amounts to Mr. Searelle in Australia. Perkins could not pay the notes when they became due, and as he required funds to bring the company to Kimberley, witness went to the defendant and borrowed £200 for Perkins. Day went to Kimberley with Perkins, witness arrived about two days afterwards, and found that defendant and Barnard had arranged on behalf of D'Arc that Perkins should perform in the circus instead of in the theatre. (Perkins had previously borrowed £300 from a Mr. Galloy.) After this arrangement had been made D'Arc agreed to pay defendant £240 in settlement of his loan to Perkins, including interest, and £300 to Galloy. Witness protested against the company performing in the circus instead of in the theatre unless Mr. Searelle's £60 was paid and witness's £50. Subsequently defendant came to witness, and asked him for the promissory note and said he could arrange it. D'Arc then gave defendant a cheque for £250 and Mr. Levy a cheque for £300 for Galloy. There was then a balance of £50 which Mr. Barnard handed to witness. Defendant afterwards took possession of the £50 and refused to give it up until his hotel expenses and fare to Kimberley had been paid, and returned to Cape Town without paying it.

Cross-examined by defendant: Perkins could not leave Port Elizabeth until money had been sent to him. Witness held a deed of sale over Perkins's theatrical property in favour of Mr. Searelle, and when execution was issued in Cape Town against Perkins witness claimed the property attached under the deed of sale.

Defendant then entered the box and detailed the circumstances attending the loan of the £200 and his visit to Kimberley with the Perkins Opera Company. He said he had always been ready to pay the balance of the £50, namely, £39 4s. 8d., after disbursements on account of Perkins, but he did not know who was entitled to the money, and had handed it to plaintiff's attorneys, together with a statement of account to abide the result of the present action.

The Court gave judgment for the plaintiff for £39 4s. 8d. and costs.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

IN RE THE ALBION MASONIC HALL COMPANY, IN LIQUIDATION.

Mr. Juta presented the first report of the official liquidators of the above-mentioned company.

The Court made the usual order as to the report lying for inspection at the Master's Office and at the office of the liquidators.

SUPREME COURT.

WEDNESDAY, AUGUST 19.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. RHENOSTER.

Mr. Justice Buchanan remarked that this case had come before him for review from the Resident Magistrate of Calvinia. The prisoner was indicted for contravening Act 15 of 1887, for using violence, threats, and intimidation to induce a certain servant to leave her mistress's employment. The prisoner was found guilty, and sentenced to two months' imprisonment. The Act under which the prisoner had been charged was the Crown Lands Disposal Act, which in no way referred to masters and servants. But even if the prisoner had been indicted under the correct Act, there was no proof whatever that he had used violence, threats, or intimidation, and under these circumstances the conviction must be quashed.

PETERS V. SKEAD, COWLING AND CO.

Debt—Action for—Alleged breach of contract—Quarrying operations.

Mr. Schreiner appeared for the plaintiff, and Mr. Searle and Mr. Jones for the defendants.

This was an action instituted by Mr. George Peters, of Cape Town, against Messrs. Skead, Cowling & Co., for the sum of £143 15s.

The declaration alleged that in the month of May, 1891, the plaintiff entered into two agreements with the defendants, by the first of which the plaintiff undertook to remove ground from a certain quarry at the top of Strand-street, Cape Town, at the rate of 1s. 6d. per cubic yard, and by the second of which the plaintiff undertook to blast certain rock at the said quarry at the rate of 2s. per cubic yard. The said agreements were terminable by notice, and the defendants gave notice to the plaintiff to cease working on the 2nd July, 1891, and plaintiff ceased accordingly. Under the first agreement the plaintiff duly removed 883 cubic yards of ground, and became entitled to receive from the defendants the sum of £64 4s. 6d. Under the second agreement the plaintiff duly blasted 2,106 cubic yards of rock, and became entitled to receive from the defendants the sum of £210 12s. From time to time the defendant paid to the plaintiff in respect of the said agreements sums amounting to £115, and supplied dynamite and other articles to the sum of £18 1s. 6d. The plaintiff was entitled to demand, and had demanded, from the defendants payment of the sum of £143 15s., being the difference between the amount of the aforesaid sums of £66 4s. 6d. and £210 12s., and the amount of the aforesaid sums of £115 and £18 1s. 6d., but the defendants refused to pay the said sum of £143 15s. or any part thereof. Wherefore the plaintiff prayed for judgment for the sum of £143 15s. with costs of suit.

The defendants in their plea denied that they had entered into the two agreements referred to in the declaration, but admitted that they had agreed with the plaintiff for the removal of the ground from the quarry at the rate of 1s. 6d. per cubic yard. They further alleged that towards the end of May, or in the beginning of June, 1891, they entered into an agreement with the plaintiff whereby the latter undertook to excavate and remove by blasting a certain block of rock situate in the said quarry, and roughly estimated to contain about 1,000 cubic yards. That the plaintiff undertook to blast vertically downwards from the highest portion of the said block to a distance of about 25 feet, reckoned vertically downwards, and to take out and remove by the above operations the whole block of rock, leaving as a result of the said operations a flat surface or platform of rock, extending about 100 feet in length, measured horizontally, along the face of the said quarry, and about 35 feet in width. For the said piece of work, the plaintiff was to be entitled to payment, on completion thereof, at the rate of 2s. per cubic yard. That the plaintiff failed to perform his portion of the said agreement, and instead of blasting the said rock and excavating it vertically, excavated about 2,100 yards of rock from the said quarry in a sloping direction, leaving the face of the said quarry on an incline, and had not blasted, excavated, or removed the solid rock in the lower portion of the said rock as stipulated above. That the value of the work performed by plaintiff, and referred to in the last paragraph, did not exceed 1s. per yard. That the defendants had from time to time advanced sums of money to the plaintiff, and that they were willing that the said advances should go in satisfaction of the work so done, although it had not been performed according to agreement. The defendants further alleged that they had paid the plaintiff the whole amount due to him under the first agreement referred to in the declaration—namely, £66 4s. 6d.—and had further paid him £72 10s. 6d., and they were willing and hereby tendered him the sum of £32 15s. 6d., being the difference between £105 6s., the value of the work referred to above, and the amount of £72 10s. 6d. already paid, together with taxed costs to date of plea.

Upon these pleadings issue was joined.

Mr. Schreiner, in opening the case, said that since the declaration had been filed an account had been rendered by the defendants, and on this account plaintiff admitted his indebtedness to the defendants in the sum of £8 4s. 6d., so that his claim in the present action would be reduced to £140 10s. 6d., and £2 9s. in respect of certain steel of which the plaintiff had only had the use, and which had been returned to the defendants, but in their account he had been debited with that amount.

Mr. George Peters, the plaintiff, examined by Mr. Schreiner, stated that he was a miner, and had formerly been in the employment of the defendants, but left them to go to the Gold-fields. In May last he asked Mr. Cowling to give him a job. Mr. Cowling told him to go to the quarry and he would show witness some work he wanted to be done. This work was to remove some 883 cubic yards of ground, which witness agreed with Mr. Cowling to remove for 1s. 6d. per cubic yard. Before he had completed the work he asked Mr. Cowling if he could do some blasting in the quarry. Mr. Cowling asked him his price, and witness said 2s. per cubic foot. Mr. Cowling told him that he would compare his price with other offers which he had had, and would let him know. Subsequently he gave witness the contract. Nothing was said about blast-

ing the rock vertically, and leaving a platform or "crushing." Mr. Robertson was to measure the work, and witness was to be paid on Saturdays for the work which had been done up to the previous Thursday. Witness was to find all materials and tools except steel and hammers. Witness had done the work in terms of his contract in a workmanlike manner. He blasted the rock downwards for a distance of 52 feet. No fault was found with his work until the 2nd July, when, as he was going to the quarry in the morning, he met Mr. Cowling, who told him he was not to do any more work. Mr. Cowling had never previously objected to the work. Witness had had some words with the defendants about not getting his money on Saturdays as had been arranged.

Cross-examined by Mr. Searle: The contract had proved a profitable one. He had been formerly employed by the defendants, and knew how quarrying should be done. After the ground at the top of the quarry had been removed nothing was said about a steam-drill. Mr. Cowling never pointed out to Mr. Robertson what work witness was to do. He did not know how long Mr. Cowling had been ill. He could not tell whether Mr. Cowling was angry or not. He had had twenty-two years' experience in quarrying, and his work could not have been done better. If he had not been stopped he would have continued blasting downwards.

Mr. Wilkinson deposed that he had had long experience in quarrying. He had seen the work that had been done by Peters, and was of opinion that it could not have been done otherwise. The price was good for the work that had been done, but if the defendants had allowed the plaintiff to continue working downwards, they would have benefited by the contract, as the cost of quarrying and removing the rock lower down would have been greater than at the top.

Mr. W. Higgo stated that he had had thirty-five years experience in quarrying. He had twice visited the quarry at the top of Strand-street, and had seen the work done by plaintiff. He was of opinion that it had been done in a workmanlike manner, and that the price was fair and reasonable. Quarrying of this kind was purely a matter of skill.

Messrs. Steppings, Stepps, and Newman gave corroborative evidence.

For the defence, Mr. Searle called Mr. William Cowling, who stated that he had been working the quarry for seven years. Plaintiff had formerly been in his service. When the work of removing the ground had been completed witness entered into a new contract with the plaintiff to blast about 1,000 cubic feet of rock. He told Mr. Robertson in Peters's presence that he wanted a platform left on which to erect a steam drill. He had been very ill while the greater part of the work had been done, and could not visit the quarry very often. On the 2nd July he noticed for the first time that plaintiff had not been carrying out his contract. He told Peters so, and remarked that he had been "robbing the quarry," by which he meant that he had been blasting the best rock only. Before his illness the work appeared to have been done fairly well. He pointed out to plaintiff distinctly the part of the rock he was to blast, but he did not tell his foreman to see that Peters did not go lower than the ledge. The firm supplied the tools and other articles, including the steel which the plaintiff required, but he had to pay for them.

Cross-examined by Mr. Schreiner: The plaintiff had been supplied with new steel which he had cut up. The contract was to remove 1,000 yards of rock more or less. He might have stopped plaintiff when he had blasted 1,000 yards. The crushing referred to in the correspondence was a mistake. The amounts paid to plaintiff on Saturdays were calculated according to the number of men employed by him. He had twice visited the quarry whilst the plaintiff was blasting.

Mr. W. Robertson, late Clerk of Works to the Municipality, deposed that he had seen the ground before it had been excavated. He took levels to see how much ground had been removed. During one of his visits to the quarry, Cowling was there, and showed plaintiff where he was to make the platform. He considered 2s. a yard a high price for the work that had been done; 1s. a yard would be a fair price.

By the Court: He had never been in the quarry while Peters was working

Mr. Cairncross, the City Engineer, stated that he had recently visited the quarry. It did not appear to have been properly worked. Witness considered 2s. a yard a high price for the work that had been done; he would say 9d. was a fair price.

Mr. W. H. Chamberlain stated that he had been a Government contractor and had built several bridges in the country, for which he had quarried his own stone. He was of opinion that Peters had blasted, not quarried.

Messrs. Beaumann and Skead were also examined.

Mr. Searle, for the defence, reviewed the evidence, and contended that the plaintiff had not adhered to the terms of his contract, and was at most entitled to a *quantum meruit*.

The Court, without calling upon Mr. Schreiner, gave judgment for the plaintiff for £142 19s. 6d. the amount claimed, with costs,

[Plaintiff's Attorney, G Montgomery-Walker; Defendants' Attorneys, Messrs. van Zyl & Buissinne.]

SUPREME COURT.

THURSDAY, AUGUST 20.

PROVISIONAL ROLL.

MARAIS V. BAARTMANN.

On the motion of Mr. Schreiner, provisional sentence was granted on a promissory note for £1,000, payable at the Western Province Bank.

STANDARD BANK V. ROBERTSON.

On the application of Mr. Searle, the final adjudication of the defendant's estate was granted.

LOUW V. GROENEWALD.

On the application of Mr. Maskew, provisional sentence was granted on a mortgage bond for £1,000.

UNION BANK, IN LIQUIDATION V. ROSSOUW.

Mr. Schreiner moved for provisional sentence on a promissory note for £207 15s. 8d.—Provisional sentence granted.

LOGAN V. CARTER.

On the motion of Mr. Watermeyer, provisional sentence was granted for £52 9s. 8d.

GENERAL MOTIONS.

PETITION OF BESSIE PARTRIDGE.

On the motion of Mr. Graham, leave was given applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.

HADJE MOCHAMAT JASSIEM AND OTHERS V. THE MASTER AND G. W. STEYTLER, (IN HIS CAPACITY AS EXECUTOR DATIVE OF THE ESTATE OF THE LATE ABDOL RAGMAN).

Marriage according to Mahomedan rite—Illegitimate children—Succession through mother—Funds in possession of Master.

Mr. Searle appeared for the applicants; and Mr. Schreiner for Mr. G. W. Steytler.

This was an application for authority to the Master to pay to the applicants such amounts as should be found due to them out of the funds in his hands to the credit of the estate of the late Abdol Ragman. The matter was before the Court on the 4th August, when it was ordered to stand over for further information. The motion now came on for further hearing. It appeared from the petition that the applicants, Hadje Mochamat Jassiem, Mochamat Gamefa, and Schaaka, are the brothers and sister respectively of the late Abdol Ragman, and children of the late Abdol Garies, who died on the 30th November, 1867; that Abdol Garies by his last will bequeathed all his property to his wife Fatima, and to his three sons; that the applicants are the surviving sons and daughter of Abdol Garies by his wife Marifa; that their brother Abdol Ragman died in Dorp-street, Cape Town, without issue, in October, 1878; that Mr. G. W. Steytler was appointed executor dative to the estates of Abdol Garies and Abdol Ragman respectively; that Dietje Uys, a sister of Abdol Garies, bequeathed to him her whole estate and effects; that Mr. G. W. Steytler, as executor dative to the estate of Abdol Garies, paid to applicants their shares out of the estate of the late Abdol Garies, including that portion received from the estate of the said Dietje Uys, but did not pay to applicants the amount alleged to be due to them out of the estate of the late Abdol Ragman, but that he paid the same to the Master of the Supreme Court. The applicants applied to the Master for the money in question, but he declined to part with the funds without an order of Cour, and hence the present application.

The Court held that the applicants, although illegitimate children of the late Abdol Garies, succeeded through their mother and were consequently entitled to the funds in question, and made an order on the Master to that effect, the order to extend to future funds coming into his possession from the same estate.

IN THE ESTATE OF THE LATE J. J. VAN HEERDEN AND WIFE.

Mr. Schreiner moved for an order in terms of the Master's report on the reference to him of the matter.

The Chief Justice, in granting the order, referred to the stamps on the reference, and remarked that the stamp duty payable on judicial proceedings generally was enormous.

PETERS V. PETERS.

On the application of Mr. Jones, the return day of the rule was extended to the last day of term.

In re A. H. MCLEOD.

On the motion of Mr. Schreiner, Mr. Alfred Henry McLeod was admitted to practise as an attorney.

VILJOEN'S HEIRS V. VILJOEN'S TRUSTEE.—(*in re* THE INSOLVENT ESTATE OF C. J. VILJOEN.)

Insolvency—Trustee—Joint will—Adiation—Life Interest—Property registered in name of Insolvent—Rights of heirs—Harris v. Bussinne's Trustee (2 Menz. 105) affirmed.

Sir T. Upington, Q.C., appeared for the applicants, and Mr Schreiner for the respondent.

This was an application by the children of the insolvent restraining the trustee in their father's insolvent estate from selling or disposing of any share other than the insolvent's life interest in certain farms situated in the districts of Uitenhage and Jansenville. It appears that on the 7th May, 1862, the insolvent and his late wife executed a joint will by which was specially bequeathed to their children as a praelegacy certain landed property, comprising five farms, and forming part of the joint estate of insolvent and his wife. The above bequest was burdened as follows: "And further, under the burden of *fidei commissum* upon the following conditions and terms, viz., that the aforementioned landed property shall always be considered as a family property, bequest, or disposal (inheritance) by the undersigned's legal descendants, and therefore that neither the landed property nor any portion of the same shall be sold, bequeathed, exchanged, leased, or in any other manner disposed of than only to or amongst the legal descendants of the testators." The will also provided that the survivor should have a life interest or usufruct in the farms during his or her lifetime. After the death of insolvent's wife, in June, 1862, the will came into force, the insolvent adiated, and has since enjoyed the usufruct. The farms have not been transferred to the children, but still remain registered in insolvent's name. In 1885 the insolvent jointly with others bound himself as surety and principal debtor for £3,000 due by his brother, on a bond, and pledged as security property acquired subsequent to his late wife's death. The principal debtor and all the other sureties have been excussed by reason of the interest on the bond being unpaid and their estates sequestrated, but there is still a deficiency of about £1,600 on the bond. In consequence of insolvent's inability to pay this amount, his estate was sequestrated at the instance of the South African Association on the 19th December, 1890 In a previous application on the 18th June last (1 C.T.L.R., 154), the Court ordered the insolvent to deliver the title deeds of the farms above referred to to his trustee in insolvency, Mr. H. Gibson. In the *Government Gazette* of Friday, 31st July, 1891, the trustee advertised for sale on Saturday, 22nd August, the insolvent's half-share as well as his life interest in the farms above referred to—and hence the present application.

Sir T. Upington, Q.C.: The trustee can only sell the insolvent's life interest. On adiation the rights of the heirs became vested, and no subsequent act of the insolvent could have the effect of divesting those rights. It is true the farms are still registered in the name of the insolvent, but that fact cannot prejudice the rights of the heirs under the will.

The Chief Justice referred to "Harris v. Buissinne's Trustee," 2 Menz. 105, (in which it was held, *inter alia*, that on the sequestration of a vendor's estate, no conveyance *coram lege loci* having been effected, the *dominium* of immovable property sold vested in the Master of the Supreme Court, and ultimately in the trustees, for the benefit of creditors.)

Sir T. Upington: The present case is distinguishable from "Harris v. Buissinne's Trustee." It would be a most serious matter if the decision in that case were to set at naught the express trusts constituted by the will. Counsel referred in his argument to the following cases: "Booysen v. The Trustees, Colonial Orphan Chamber" (Foord's Rep., 48); "Oosthuyzen's Tutrix v. Moffat" (5 Juta, 319); "Van Rooyen v. Gorman (6 Juta, 55); "Haupt v. Van der Heever's Executor" (6 Juta, 49).

Mr. Schreiner: The rights of the heirs are purely personal. There is abundance of authority for this proposition. The fact that the inheritance was adiated can confer no real rights on the heirs as against the trustee. Counsel referred to "Harris v. Buissinne's Trustee" and "Hiddingh v. Roubaix" (3 R., 11). The trustee would not press for the sale of the insolvent's life interest, but he was clearly entitled to his half-share in the property.

The Chief Justice, in giving judgment, said that he had sufficiently indicated his views in the course of the argument. Whatever rights the applicants had were purely personal, but they had no real rights as against the trustee. The trustee had repudiated the will, and was entitled to the insolvent's half-share in the properties in question. Under these circumstances, he was of opinion that the application should be refused. As the present issue might have been settled on the previous application, were it not for the opposition offered by applicant's counsel, costs would be ordered out of the estate.

Their lordships concurred.

PETITION OF NICHOLAS S. MEYER.

On the application of Mr. Juta, the Court granted an order declaring petitioner of sound mind, and releasing his curator from the charge of his person and property.

WARD V. GERALD AND CO.

Mr. Shiel moved for a rule *nisi* calling upon the respondents to show cause why the applicant should not be admitted to sue them *in forma pauperis* in an action for damages for breach of contract.

The Court granted a rule *nisi* returnable on the 27th instant.

In re MINOR CHILDREN OF THE LATE ROBERT CHRISTIE.

On the application of Mr. Jones, the Court granted an order in terms of the Master's report.

RODOLF V. VAN DER MERWE.

Mr. Schreiner applied for an order requiring the defendant to find security, and failing such security, to arrest his person *ad fundandam jurisdictionem*.

The defendant, who is a *peregrinus* and domiciled in the Transvaal, but is at present in Cape Town, is indebted to the plaintiff in the sum of £34 in respect of his daughter's school fees.

It was stated on affidavit that he was about to leave for the Transvaal this evening, and hence the application.

The Court ordered the defendant to find security in the sum of £50, failing which his arrest.

WOODMAN V. ROBINSON.

On the application of Mr. Juta, to which Mr. Graham consented, the hearing of this case was postponed until the 10th September, owing to the illness of the defendant, who is at present in Johannesburg. If necessary, the evidence of the plaintiff and the defendant's witnesses to be taken at an earlier date.

NEL AND ANOTHER V. LIND AND ANOTHER.

Mr. Searle moved for the issue of a commission to take the evidence *de bene esse*, on behalf of the defendant Lind, of Thomas Hugo, at Johannesburg, S.A. Republic.

Mr. Schreiner consented, provided the case came on for hearing on the 10th September.

The Court granted the order, and appointed Mr. Auret, or in his absence Mr. W. S. Leonard, commissioner.

In re LAWRENCE V. WARD AND WESSELS.

Costs—Taxation—Decision of Taxing Master upheld.

Mr. Juta appeared for the applicant (Ward), and Sir T. Upington, Q.C., and Mr. Graham for the respondents.

This was an application by the defendant Ward for the review of the taxation of the plaintiff's bill of costs in the cause, and for an order disallowing the several items complained of on the ground that they were not reasonable charges against the defendant. In the judgment given in the case Ward was ordered to pay the plaintiffs' costs. He now objected to pay several items connected with the defence of Wessels on the grounds that the Court did not intend to include these expenses in the order. The chief item objected to was the cost attending the evidence of Mr. Munroe, who had come from Kimberley and whose expenses amounted to £20 odd. The Taxing Master held that the order of Court was wide enough to include, and did include all the items objected to. In consequence of his decision the present application was made.

Mr. Juta was heard in support of the application.

The Chief Justice, in giving judgment, said the Court was not now asked to review its own judgment; indeed, it could not be asked to do so. The Court was rather requested to say whether the Taxing Master had correctly interpreted the order. His lordship then referred to the judgment and said it was general in its terms, and included all expenses necessarily incurred. In his opinion the Taxing Master had correctly interpreted their judgment, and under these circumstances the application must be refused with costs. His lordship further remarked that in applications of this nature it was very desirable that due notice should be given to the Taxing Master, so as to allow him sufficient time to prepare his report.

SUPREME COURT.

MONDAY, AUGUST 24.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

TOPP V. TOPP.

Alimony—Action for.

Mr. Schreiner appeared for the plaintiff; the defendant in person.

This was an action for alimony instituted by Mrs. C. Topp, of Edinburgh, against her husband, Mr. John Topp, at present living in Cape Town, and employed as a weighman by the Harbour Board. The parties were married in 1876, and in 1888 the defendant left his wife and four children,

and has not since that time contributed to their support and maintenance.

Mr. Schreiner, after stating the facts of the case, and reading the evidence taken on commission in Edinburgh, called

Mr. W. Mitchell, clerk to the Dock Superintendent, who stated that he knew the defendant, that he was employed in the Alfred Dock, and received 42s. a week wages.

The defendant then entered the box, and said that when he was leaving his wife he gave her half of all he possessed, namely, £35; he had since sent home about £20. His wages were small, and he could not afford to allow his wife more than 8s. a week.

The Court, after hearing the evidence, ordered the defendant to contribute £3 per month towards the support of his wife and children, the defendant to pay the costs of the proceedings.

[Plaintiff's Attorney, G. Montgomery-Walker.]

BRASCH V. BRASCH.

Mr. Juta appeared for the plaintiff, the defendant in default.

This was an action for restitution of conjugal rights, instituted by Mr. Joseph Brasch, of Cape Town, against his wife by reason of her desertion.

The plaintiff in his evidence stated that he was married to his wife on the 23rd September, 1887. His wife and he lived together until the 3rd May last, when she left him and has since refused to return. His wife had left in consequence of his refusal to allow his mother-in-law to come and live with them.

The Court ordered the defendant to return to her husband on or before the 31st August, failing compliance with which order to show cause on the 12th September why a decree of divorce should not be granted.

IN RE THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Schreiner moved for the sanction of the Court to certain compromises proposed by the liquidators.

The Court sanctioned the compromises, objections (if any) to be heard to-morrow.

IN RE THE PAARL BANK, IN LIQUIDATION.

Company—Bank in liquidation—Compromises—Liability of past shareholders.

A compromise with a present shareholder releases the former holder of the particular shares held by the present holder, but it cannot release persons who held shares other than those in respect of which there has been a compromise.

Sir T. Upington, Q.C., moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with shareholders of the said bank.

Mr. Juta, who appeared for Mr. G. W. Steytler, one of the liquidators and a creditor in the sum of £5,000, opposed the compromises on the grounds set forth in Mr. Steytler's affidavits, which are briefly as follows:

1. That from his official position he could state that when all present shareholders have been excussed, there will still be a deficiency of over 10s. in the £.

2. That he was advised no compromise could be effected without the consent of all the shareholders or creditors, and that such consent has not been obtained.

3. That there are past shareholders of the said bank who would be liable after excussion of present shareholders.

4. That even if the liquidators can show that it would be more to the benefit of creditors to compromise with present shareholders than to excuss them, he was advised that execution or process in the nature of execution is necessary to retain a hold upon previous shareholders who are liable as past holders of shares in the said bank.

5. That the Paarl Bank is an unlimited liability company, and it will be necessary to make a further call on shareholders.

6. That the Court has already decided that compromises with present shareholders cannot be effected without liberating former shareholders, who would otherwise be liable.

Mr. Juta contended that if the compromises suggested by the liquidators were sanctioned, past shareholders would be released from all liability, and that, although more might be gained by accepting the compromises than by excussing the shareholders who had made the offers, still the creditors of the bank generally would suffer by the adoption of such a course.

Sir T. Upington: The liquidators have carefully considered the compromises suggested, and are of opinion that it would be to the interest of the liquidation that they should be accepted. Past shareholders will not necessarily be released from liability. I can see a difficulty in dealing with any general question of this description. There must be information to show that in any special case the compromise would not be in the general interests of the Bank.

The Chief Justice: The liquidators have given certain reasons why the compromises proposed should be sanctioned by the Court. In the case of one they said the present shareholder himself could not pay more than the amount, and they showed that three past shareholders were men of straw, and that two were insolvent. In regard to the other compromise, they said the shares were

acquired so far back as 1881 by the present shareholder from his father, who was now dead. In answer to that, all the opponents of the compromise could say was that there were past shareholders. That was well known, but what the Court wanted to know, and what they had not been told, was the position of those past shareholders. Would more be acquired from them, and the excussion of the present shareholders, than under the compromises? In the absence of any proof to the contrary, the Court must take it that the statements of the liquidators were correct, and that it was for the benefit of creditors themselves that the compromises should be sanctioned. It was said that there was an idea prevalent abroad that if some of the past shareholders were released they were all released. He did not know where the idea was acquired from, the Court had never said anything to that effect. A compromise with a present shareholder released the former holder of the particular shares held by the present holder, but it did not release persons who held other shares than those in respect of which there was a compromise, so that he did not see how such an idea could have arisen that the past shareholders would be released. In the present case there was nothing to show that the compromises would not be for the benefit of creditors, and as there was everything to show that they would be for their benefit, the Court would sanction them.

Mr. Justice Buchanan concurred in the judgment, and in the exposition of the law given by his lordship the Chief Justice.

WRIGHT AND CO. V. THE COLONIAL GOVERNMENT.

Contract with Cape Government—Deductions from moneys payable under contract lodged in bank in name of Agent-General as security for due fulfilment of contract—Equitable assignment—Insolvency of assignors—Notice of assignment—Refusal to recognise same—Transfer of funds to Colonial Treasury—Cession—Payment by Colonial Government to cessionaries—Judicature Act of 1873—36 and 37 Vic.—Cap. 66, sec. 25 (6)—Case governed by English Law.

The law of this colony requires no particular form of words for the purpose of effecting a complete cession of action. What it does require is that the intention to effect the cession should be clear and beyond doubt, "Fick v. Bierman" (2 Juta, 26), and that no further Act should be necessary to complete the cession, "Mills v. Benjamin" (Buch., 1876, 115).

If there have been two cessions and the first cession was completed before the execution of the second one the first must prevail.

Whatever the rules of the English common law may have been before 1873, it was a settled rule of the Courts of Equity that anything written, said, or done in pursuance of an agreement and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person amounted to an equitable assignment. The substance of the transaction was looked to, and if the intention of the parties to transfer the *chose in action* or fund to the use of the assignee was manifest, the fact that somewhat inappropriate language was used for the purpose would not be allowed to defeat their intention. Notice, however, to the debtor or holder of the fund was essential to the completion of the assignment.

Mr. Searle and Mr. Schreiner appeared for the plaintiffs, and the Attorney-General (Mr. Innes, Q.C.) and Mr. Giddy for the Government.

This was an action instituted by the plaintiff company against Mr. James Sivewright, in his capacity as Commissioner of Crown Lands and Public Works, for the sum of £3,512, with interest *a tempore morae*, alleged to be due under the following circumstances as set forth in the declaration, which is as follows:

1. The plaintiffs are a firm of bankers carrying on business at Nottingham in England; the defendant is James Sivewright, the Commissioner of Crown Lands and Public Works in this colony, and is sued as representing the Colonial Government.

2. By an agreement dated the 15th November, 1883, and made between the Government of the Colony of the Cape of Good Hope, by the Agent-General for the said Colony (Sir Charles Mills), for and on behalf of the said Government of the one part, and Christopher Firbank and George Pauling, of 25, Bedford Row, in the county of Middlesex, trading together under the style of Firbank & Co., therein and hereinafter called the contractors, of the other part, after reciting that the said Government had determined upon the construction in the said Colony of the railway from Sterkstroom to Aliwal North, hereinafter

described, and that the said Sir Charles Mills had been authorised to enter into that contract for the construction and temporary maintenance thereof, the said contractors agreed with the said Government and also with Sir Charles Mills, for and on behalf of the said Government, that they would construct, execute, and complete in sections the said railway and works therein mentioned, and maintain the same for a year after completion for the sum therein mentioned, to be paid in instalments upon the certificate of the Engineer of the said Government.

3. Clauses 57 and 59 of the said agreement are as follows:

"57. As a security for the due performance of this contract a sum equal to 10 per cent. of the amount of every certificate will be deducted therefrom until the deductions amount to £19,758, being 5 per cent. upon the contract sum. These deductions will be invested at the risk of the contractor by the Government, in the name of the Agent-General, in such securities as the contractor may select and the Agent-General approve, and the interest of such investments will be paid to the contractor as received so long as he continues duly to perform his engagements under this contract. The principal moneys, or the securities for the same, will remain in the hands of the Government as a guarantee fund, subject to be applied as hereinafter mentioned, and subject thereto one-half thereof, with any accrued interest not previously paid to the contractor, shall be paid to him when the due completion of the contract as regards the construction of the railway and works shall be certified, and the other half with any such accrued interest when the due completion of the contract as regards the maintenance of the railway and works shall be certified."

"59. The guarantee fund, and also the moneys secured on the bond of the contractor and his sureties hereinbefore referred to, or any part or parts thereof respectively, shall, if necessary, be applied in or towards making good any defect or unsoundness which shall be certified by the engineer as existing in the railway and works or any of them, or any part thereof, or in the materials used in the formation and construction thereof, and in making good any default or neglect of the contractor in relation to the premises, and any breach of covenant on his part, and subject thereto the guarantee fund, or the balance thereof, shall be paid to the contractor on the completion of the contract as hereinbefore provided."

4. The said contractors have long since completed the construction of the said railway and works, and have maintained the same for one year after completion, and the said railway and works have been taken possession of by the said Government.

5. Instalments of the contract price for the construction of the said railway were from time to time in the year 1884 paid to the said contractors, after making the deductions therefrom specified in clause 57 of the said agreement. Such deductions in the year 1884 amounted to the sum of £10,000.

6. The said sum of £10,000 was, pursuant to clause 57 of the said agreement, invested by the said Government in the name of Sir Charles Mills at the request of the said contractors, by depositing the same with the plaintiffs' bank in the name of the said Agent-General.

7. From time to time during the year 1885 the plaintiffs, at the special instance and request of the said contractors, advanced to them sums of £6,000, £4,000, and £3,000 upon loan.

8. For the better security of plaintiffs in respect of the repayment of the said sums so lent and advanced the contractors ceded to the plaintiffs all their right, title, and interest in and to the said sum of £10,000 deposited with plaintiffs as aforesaid.

9. Due notice of the said advances and of the said cessions were given to the said Agent-General as aforesaid.

10. Thereafter, on or about January 10, 1886, the sum of £2,426, being part of the said sum of £10,000, was withdrawn by the said Sir Charles Mills acting as aforesaid, and on or about January 12, 1886 (pursuant to an arrangement previously made between the parties), the said contractor gave to the said Sir Charles Mills a receipt for the said sum, and the said Sir Charles Mills gave to the said contractors a cheque for the said sum which the said contractors paid to the credit of the plaintiffs, and the said sum was accordingly received by the plaintiffs, and applied by them in reduction of the money owing to them in respect of the said advances.

11. Thereafter, on or about May 11, 1886, the said Sir Charles Mills, acting as aforesaid, gave notice that he would withdraw the sum of £8,512, portion of the sum of £10,000 deposited as aforesaid, on August 2, 1886.

12. Thereafter, on or about July 28, 1886, the said contractors, by their duly-qualified agent, one Robert Elliott Cooper, appointed by power of attorney one George Evans, the manager of the plaintiffs' bank at Nottingham, their agent to receive such moneys as might become due and payable to them from the said Government in terms of the said contract.

13. On or about July 30, 1886, the plaintiffs gave notice to the said Sir Charles Mills, acting as aforesaid, of the appointment of the said Evans.

14. Thereafter, on or about August 11, 1886, the plaintiffs, at the request of the said Sir Chas. Mills, acting as aforesaid, paid the sum of £8,512 to the credit of the said Agent-General at the Standard Bank of South Africa.

15. The said sum of £8,512 was paid over as aforesaid upon the condition and with the under-

standing that the said sum should be thereupon paid over to the said Evans, for and on behalf of the plaintiffs, to be by them applied in reduction of the aforesaid liability in respect of the said advances.

16. In breach of his duty, and in violation of the said condition and understanding existing between himself and the plaintiffs, the said Sir Charles Mills, acting as aforesaid, neglected and refused to pay over the said sum or any portion thereof, and the Colonial Government, after lawful demand, still neglects and refuses to pay over the said sum or any portion thereof.

17. There is now owing to the plaintiffs in respect of the advances aforesaid a sum exceeding the amount of £3,512.

18. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiffs to recover from the Colonial Government the sum of £3,512, but the said Government refuses to pay the said sum or any part thereof.

The plaintiffs claim:

(*a*) The sum of £3,512, with interest *a tempore morae.*

(*b*) Such alternative relief as may seem meet.

(*c*) Costs of suit.

The defendant in his plea denied that the contractors at any time ceded to the plaintiffs their right, title, and interest to the £10,000 referred to in the declaration. He further denied that notice of any cession had been given to the Agent-General as alleged, but pleaded that on the 18th June, 1885, the plaintiffs informed the Agent-General by letter that the contractors had, in the months of January and March, 1885, given them a lien upon the retention money deposited in the plaintiffs' hands in the name of the said Agent-General, and that the latter refused to admit the constitution of the alleged lien, and he (defendant) denied that any such lien had been constituted. The defendant admitted the payment of £2,426 by the Agent-General to the contractors about the 12th January, 1886, and alleged that on or about the 16th November, 1885, the contractors ceded to the Cape of Good Hope Bank all their right, title, and interest to the sum of £3,512 (the amount in dispute), and to all the said retention money. The defendant further specially pleaded that in or about the month of May, 1886, the estate of Firbank, Pauling & Co., being the said contractors, was sequestrated as insolvent, and the power purported to be given as alleged in the declaration was of no force or effect. That thereafter, in or about the month of November, 1886, the said sum of £3,512 was by the Colonial Government paid over to the Cape of Good Hope Bank, with the sanction of the trustees of the said insolvent estate of Firbank, Pauling & Co., given under and by virtue of a resolution passed at a meeting of creditors of the said insolvent estate held on the 27th August, 1886, and that the plaintiffs did not prove as creditors upon the said estate. Finally, the defendant admitted his refusal to pay over any portion of the £3,512 to the plaintiffs, and prayed that their claim might be dismissed with costs.

The plaintiffs in their replication admitted that on or about November 6, 1885, one Pauling, a member of the firm of contractors, purported to make the cession referred to in the plea, but alleged that the contractors had already at that date parted with their interest in the said sum, and that the said alleged cession was invalid and of no legal force and effect. They denied any knowledge of the payment by the Government of the sum of £3,512 to the Cape of Good Hope Bank, and refused to admit the same. Upon these pleadings issue was joined.

Mr. Searle opened the case, and read part of the correspondence which had passed between the parties. In his argument he contended that an actual assignment had been given to the plaintiffs long before any assignment had been made to the Cape of Good Hope Bank, and that Sir Charles Mills had notice of the assignment. The contract had been made in England, the money was to have been paid in England, and Sir Charles Mills had no right to transfer the money to the Cape as he had done.

The Attorney-General: It is difficult to gather from the declaration the exact grounds upon which the plaintiffs base their claim. The money alleged by the plaintiffs to have been the property of Firbank & Co. was never as a fact theirs, it belonged to Sir Charles Mills, and was lodged in his name. The money had been paid over to secure the Government contract being carried out satisfactorily. There never had been an assignment, the most that the plaintiffs had ever had was a lien, and this they had lost when they parted with the funds.

The Attorney-General had not concluded his argument when the Court rose.

SUPREME COURT.

TUESDAY, AUGUST 25.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN].

WRIGHT AND CO. V. THE COLONIAL GOVERNMENT.

The hearing of this case was continued, Mr. Searle and Mr. Schreiner appearing for the plaintiffs and the Attorney-General (Mr. Innes, Q.C.) and Mr. Giddy for the defendants.

The Attorney-General continued his argument for the defence, and said that the English law had to be looked to by the plaintiffs in prosecuting their claim Counsel referred the Court to the English Judicature Acts, "Brice and Bannister," 3 Q.B.D., 569; "Byrne v. Carvalho," 4 M. and C., 690; "*Ex-parte* Montague, *in re* O'Brien," 1 Ch. D., 554; "Bell v. London and North-Western Railway Company," 15 Beavan, 548; "*Ex-parte* Hall," 10 Ch. D., 615; Storey. C. of L., 409 and 417; "*In re* Howse," 8 Juta, 14. The case, he contended, clearly depended upon the plaintiffs proving the assignment, and there was no evidence of such an assignment as the English law required. There was no order to Sir C. Mills to pay the money, and there was no cession from Firbank to Wright, such as the law required for the plaintiffs to succeed. The whole kernel of the case was that before November, 1885, the plaintiffs must show that they had an irrevocable right to claim this money as soon as it came into the hands of Sir C. Mills. No such right had been proved to exist. There was only one firm, whether it was called Firbank & Pauling, or Firbank & Co, or J. & C. Firbank. Assuming there was but this one firm, it was clear that when Sir C. Mills had the money placed in his hands the estate of the firm had been sequestrated, and the order of sequestration covered the firm's property all over the world.

Mr. Searle replied for the plaintiffs, and said Firbank never claimed this money on his own behalf, but assisted Mills in every way.

Equity recognised the intent, not the form. Firbank had informed Wright in the most decisive manner that the money was at his disposal. In a letter which was put in Firbank definitely and formally agreed to the assignment to Wright of the whole of the balance of the retention fund as security. Wright having that letter in his hands, the assignment was complete, except in so far as legitimate Governmental deductions were concerned. It was scarcely contended that Wright was prevented from paying the money away at all, otherwise there could have been no assignment. Firbank had never in any way claimed the money, but had always regarded it as belonging to Wright. The money was never placed in the hands of Sir C. Mills with a view to his dealing with it independently, but simply as a matter of form, in order that he might make legal deductions due to him, and then hand over the balance to the plaintiffs, whose property it was. Sir C. Mills took up the position that the money was not assignable at all, which was a wrong position, looking to the terms of the contract. The money was clearly money that Firbank could deal with, and if there had been a dispute between him and the Agent-General he could have come into court and demanded the return of the money, subject to the right of the Agent-General with regard to legitimate deductions. It was perfectly clear that there were two firms, one in England and one at the Cape. It was scarcely to be said that an insolvency here debarred the persons in England dealing with the moneys of that firm, so far as their English domicile was concerned, in the absence of bankruptcy proceedings in that country. The rights now in dispute were acquired in England and could not be affected by the insolvency in the Cape Colony. Counsel quoted: Snell on Equity, 5th ed., ch. 5, 136 and 139; Robson, 5th ed., 389; "Gladstone v. Musurus Bey and Others," 8 Jurist, N.S., 71; "Morgan v. Larivière," L.R. 7; English and Irish Appeal Cases 428, and L.J. 44, N.S., 457; "Twycross v. Dreyfus," L.R. 5 Ch. D., 605; "*Ex-parte* Morgan," 12 Vesey, 6; "Langton v. Horton," 1 Hare, 549; and "Byrne v. Cavalho," 4 M. and C., 690.

Cur ad vult.

Postea (8th September).

The Court delivered the following judgments.

The Chief Justice said: The plaintiffs are English bankers who, in the year 1885, lent and advanced to the contractors for the construction of the railway from Sterkstroom to Aliwal North various sums of money, amounting in all to £18,000. Before that year the Agent-General for this colony had deposited sums amounting in all to £10,000 with the plaintiffs, on interest, in terms of the 57th clause of the agreement of 15th November, 1883, made in England between the contractors and the Agent-General. The clause is as follows: "As a security for the due performance of this contract, a sum equal to 10 per centum of the amount of every certificate will be deducted therefrom until the deductions amount to £19,758, being 5 per cent upon the contract sum. These deductions will be invested at the risk of the contractor by the Government in the name of the Agent-General, in such securities as the contractor may select and the Agent-General approve; and the interest of such investments will be paid to the contractor as received so long as he continues duly to perform his engagements under this contract. The principal moneys or the securities for the same will remain in the hands of the Government as a guarantee fund, subject to be applied as hereinafter mentioned, and subject thereto, one half thereof, with any accrued interest not previously paid to the contractor, shall be paid to him when the due completion of the contract as regards the construction of the railway and works shall be certified, and the other half with any such accrued interest when the due completion of the contract as regards the maintenance of the railway and works shall be certified." The in-

terest on the deposits, as it accrued, was not paid direct to the Agent-General, but, with his consent, it was transferred from his account to the contractors' current account with the plaintiffs (letter of January 9, 1885). The loan of the plaintiffs to the contractors was made in three sums of £6,000, £4,000, and £3,000 respectively. On the occasion of the first loan Fairbank, on behalf of himself and his co-contractor Pauling, sent the following letter, stamped, it would appear, as a deed of assignment, to the plaintiffs: "January 12, 1885.—Dear Sirs,—With reference to my proposition to you to-day for a loan at 6 per cent. interest, which loan I expect to extend to say four months, I shall be willing to deposit with you as security £24,000 Graham's Town and Port Alfred Railway shares, and also I will undertake in no way to assign or deal in to anyone else, say, £7,000 of the retention fund on the Aliwal North contract you now hold through the Agent-General of the Cape, and I empower you, before paying over to me under order of the Agent-General that sum, to satisfy yourselves as to that loan. It is, however, understood that this lien upon the retention is subject to the Agent-General's rights under my contract.—Yours, Christopher Firbank, for self and partner." On the occasion of the second loan the contractors requested the plaintiffs to furnish the form of letter which should be written by the contractors as security, and accordingly the following form was sent to, and duly copied, stamped, and signed by the contractors: "March 11, 1885.—Dear Sirs,—In consideration of your granting to my firm of J. & C. Firbank & Co. a further advance of £4,000 . . . . I hereby further undertake to give you a lien upon the remaining £3,000 until you have been repaid the said further sum of £4,000 now advanced by you. It being understood that your lien upon the whole of the retention money is subject to the Agent-General's rights under my contract . . . . Yours, Christopher Firbank." On the occasion of the third loan a third stamped letter was written by Firbank to the plaintiffs, by which the writer expressed his willingness to assign a further sum of £3,000 of the retention money as security for the fresh loan of £3,000. On the 18th of June, 1885, the plaintiffs wrote to the Agent-General as follows: "We beg to give you notice that by three separate letters of agreement from Messrs. Firbank & Co., dated respectively January 2, March 11, and March 28 of this year, they have given, to us a lien upon an aggregate sum of £13,000 of the retention money of the Aliwal North railway contract, £10,000 of which is now deposited with us in your name, such lien being of course subject to your rights under their contract. We presume you will not require to see these documents until the money becomes payable.' The Agent-General wrote in answer: "Under no circumstances can I recognise or sanction any dealings with the moneys in question by any person other than myself which may be deemed to alter or affect the original terms of deposit, or limit my right to call for the moneys when wanted" The plaintiffs in reply wrote: "Messrs. Firbank gave us (with other securities) the lien, subject to all existing rights on your part respecting it, with the intention that when (if ever) the terms of the contract were fulfilled, and you were in a position to pay over the whole or part of the retention fund to them, we should be entitled to receive it direct from you on their behalf in repayment of advances made to them" The letter concluded by expressing the hope that the Agent-General would accept the notice of the 18th of June, but he declined to do so. On the 16th of November, 1885, the contractors "ceded, assigned, and transferred" to the Cape of Good Hope Bank all such sums of money as they might become entitled to under their contract with the Government, and appointed the manager of the bank as their attorney irrevocably to recover such moneys from the Government. The cession contains the signature of George Pauling as well as of the three firms, viz., J. & F. Firbank & Co., Firbank, Pauling & Co., and Firbank & Co., these being the different styles assumed by the contractors in carrying on their business. On the 7th of January, 1886, the Agent-General requested the plaintiffs to pay to his credit in the Standard Bank the sum of £2,426, being part of the £10,000 which he had deposited with the plaintiffs. The object of the withdrawal was to enable him to pay that sum direct to the contractors, for he seems at this time not to have been aware of the cession to the Cape of Good Hope Bank. The plaintiffs, in answer, said that as they had a lien on the retention money due to the contractors when released by the Agent-General, they wished payment to be made to the contractors by a cheque crossed with the name of the plaintiffs' firm. The Agent-General, in reply, "intimated his inability to comply with this request, except at the instance of Messrs. Firbank & Co. themselves," and ultimately, on 12th January, 1886, he gave an uncrossed cheque to the contractors, who passed the money to the plaintiffs' credit. On 8th April, 1886, the estate of the contractors, under the style of Firbank, Pauling & Co., was sequestrated in this colony as insolvent. On the 11th of May, 1886, the Agent-General gave notice to the plaintiffs that he would, on the 12th of August following, withdraw a sum of £3,512, being part of the guarantee fund. On the 1st of June following the plaintiffs wrote to him requesting him to inform them whether that sum had been earned by the contractors, and would be placed at the disposal of the plaintiffs on

or after the 12th of August, but the Agent-General refused to add anything to his notice of withdrawal. Accordingly in July the plaintiffs obtained a substituted power from the contractors' agent in England, and he himself wrote as follows to the Agent-General: "As part of the retention fund will shortly fall due, we beg to inform you that Mr. Geo. Evans holds our power of attorney, and will receive and grant the necessary receipt for such retention fund when payable. As you are aware, our interest in that fund was assigned to Messrs. Wright & Co. by agreements dated January 12 and March 11, 1885, as security for an overdraft at their bank." The Agent-General, in answer, wrote that the matter would have his attention when the necessary authority should have been received from the Cape Government, and on the same day he wrote a similar answer to the plaintiffs' letter, enclosing the power of attorney. On the 11th of August the plaintiffs, who were not then aware of the cession to the Cape of Good Hope Bank, sent a draft for £3,512 to the Agent-General, and on the 25th May wrote to him asking when payment of that sum would be made to them, and offering to send the contractors' letters of agreement to him for perusal. The reply, dated the 27th of August, was that the plaintiffs' letter would be submitted to the Colonial Government for instructions. The instructions appear to have been that the money was to be sent to the Cape, and it was so sent. By this time the line of railway had been completed, there was no balance due from the contractors to the Government, and since that time the plaintiffs have retained the balance of retention money, viz., £4,062, which had been deposited with them by the Agent-General. On the 27th of August, 1886, the creditors of the insolvent estate of Firbank, Pauling & Co. passed a resolution authorising the payment of the Aliwal North Railway retention fund to the Cape of Good Hope Bank. In the month of November following the Government, with the consent of the trustees of the insolvent estate, paid the sum of £3,512 to the Cape of Good Hope Bank. The object of the present action is to recover this money from the Government. It is obvious from the facts, which I have endeavoured to state as fully and clearly as possible, that the real question to be determined is whether before November, 1885, the date of the cession to the Cape of Good Hope Bank, the plaintiffs had acquired such an interest in the retention fund deposited with them as could not be defeated by that cession or by the subsequent insolvency of the contractors. The law of this colony requires no particular form of words for the purpose of effecting a complete cession of action. What it does require is that the intention to effect the cession should be clear and beyond doubt, as was decided in "Fick v. Bierman" (2 Juta, 26), and that no further Act should be necessary to complete this cession, as was decided in "Mills v. Benjamin" (Buch., 1876, 115). In the former case an oral cession was relied upon, but the Court held that, although writing was not essential, a loose understanding such as had been deposed to could not be taken to amount to such a complete transfer of the alleged cedent's rights as to avail against his creditors in insolvency. In the latter case the Court held that the mere fact that a bill of exchange in favour of Mills had been obtained by Benjamin from one branch of the Standard Bank upon another branch for the purpose of paying a debt due by Benjamin did not amount to a cession of the right to the money in favour of Mills. The bill had been obtained for the purpose of being sent to Mills, but in fact it was not sent, and the Court held that the cession was not complete. In both cases the Court took for granted that if an insolvent had been divested of his right of action against his debtor and had before insolvency transferred his right for valuable consideration the cessionary would, in competition with the creditors of the insolvent, be entitled to the benefit of the proceeds recovered from the debtor. The same rule would apply *à fortiori* to any competition arising with a subsequent cessionary. If the first cession was completed before the execution of the second one the first must prevail. It is common cause, however, in the present case that the question whether the assignment to the plaintiffs was complete must be decided by the law of England, where the contract with the contractors was executed, and where the deductions were invested. We have not been favoured by either side with the evidence of experts as to the law of England, but I am satisfied that although the legal phraseology is very different there is no substantial difference in the principles of law applicable to the present case. Such differences as exist do not materially affect the present case. Whatever the rules of the English common law may have been before 1873, it was a settled rule of the Courts of Equity that anything written, said, or done in pursuance of an agreement and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person amounts to an equitable assignment. The substance of the transaction was looked to, and if the intention of the parties to transfer the *chose in action* or fund to the use of the assignee was manifest, the fact that somewhat inappropriate language was used for the purpose would not be allowed to defeat their intention. Notice, however, to the debtor or holder of the fund was essential to the completion of the assignment. Thus, in the leading case of "Ryall v. Rowles"

(1 Ves., Sen., 348), it was held that in order completely to divest a bankrupt of debts owing to him he must have done everything that is equivalent to a delivery of movable goods, and one of the judges, Sir Thomas Parker, said that that which is equivalent to delivery of movables is, in the case of a debt, an assignment and delivery of the security and notice to the debtor of the assignment. And in the case of "Dearle v. Hall" (3 Russ, 48), Lord Lyndhurst observed that in cases like the present the act of giving the trustee notice was, in a certain degree, taking possession of the fund; it was going as far towards equitable possession as it was possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. The twenty-fifth section (sub-section 6) of the Judicature Act, 1873, retains the necessity of notice, but the Court has not been favoured with any arguments as to whether that section was intended to modify in other respects the rules as to equitable assignments which had up till then been adopted by the Courts of Equity. The sub-section reads as follows: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor." In the case of "Brice v. Bannister" (L.R., 3, Q.B. Div., 569), one Gough had agreed to build a vessel for the defendant Bannister, the price of which was to be paid by instalments Before the vessel was finished Gough, being in debt to the plaintiff Brice, by an instrument in writing directed the defendant to pay to the plaintiff £100 out of moneys due or to become due from the defendant to Gough. At this time all the instalments then due had been paid by the defendant to Gough. Notice of the instrument was given to the defendant, but he refused to be bound by it, and he afterwards paid to Gough the balance of the price of the vessel, being more than £100. In an action before Coleridge, C.J., to recover this balance it was contended on behalf of the defendant that judgment ought to be entered for him on the following grounds: (1) That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him by virtue of the Judicature Act, 1873; (2) that there was no binding acceptance of the order by the defendant; and (3) that had not the defendant made advances to Gough, or to his creditors other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant. Lord Coleridge, however, held that the fact that the actual sum assigned under the order had not become due was not material in reference to the power of the plaintiff to enforce it, and that it was no straining of the words of the sub-section "to construe the request to pay as an absolute assignment of the debt." On appeal the judges of the Court of Appeal seemed to ignore the statute altogether, but decided the case upon the general principles of the Courts of Equity. The third objection which had been taken in the Court below weighed most with them, and Brett, L.J., was in favour of allowing the appeal on the ground that business transactions should not be hampered by any equitable doctrine which will prevent a man from doing what he might otherwise do merely because something had happened between other parties. The majority of the Court, however, held that the equitable doctrine which allows a man to assign a debt, even though not yet due, and allows the assignee to bind the debtor by notice was applicable and ought not to be departed from. In the present case it is admitted that, whether the contractors' dealings with the plaintiffs amounted to assignment or not, the Agent-General had full notice of those dealings, and that he represented the Colonial Government for the purpose of receiving such notice. His objection to the notice was not that there had been no absolute assignment, or that it purported to be by way of charge only, but that he could not recognise any dealings with the fund deposited with the plaintiffs which might limit his right to call for the money when wanted. He was promptly informed that there was no intention of limiting that right, but he would not accept any obligation towards the plaintiffs, although it was to accrue only after the fund had been paid to him. The documents upon which the plaintiffs relied were offered to him for inspection, but he refused to look at them. The great difficulty which has weighed with me in this case is that there is a seeming unfairness in expecting a debtor to ascertain from loose agreements between his creditor and a third person whether there has been an absolute assignment or not, but the difficulty vanishes where the debtor says in effect: "Your mutual agreement does not concern me, for when the debt becomes payable I shall deal with it, as I shall then be advised whether it has been assigned or not." If the objection had been taken that there is no single formal document

effecting in terms an absolute assignment of the fund, the plaintiffs would, I have no doubt, have been able to procure such a document from the contractors. As the matter now stands, we have to look at the whole of the correspondence between the plaintiffs and the contractors to ascertain the true nature of their dealings. Three of the letters written by the contractors are duly stamped—I presume as deeds of assignment—but we are not on that account precluded from considering the rest of the correspondence, without which the three more formal documents are somewhat obscure. In two of these documents the right assigned is loosely described as a "lien" on the fund, but this term appears to have been used because, until the money became payable to the contractors, it was to remain on deposit with the plaintiffs. The third document, which refers to the transfer of the fund not yet deposited with the plaintiffs, uses the more correct term "assign." In the rest of the correspondence the terms "lien" and "assignment" appear to have been treated as convertible terms. For example, on the 6th of March, 1885, the plaintiffs write to the contractors: "Would you kindly write us a further letter assigning the remainder of the retention fund to the bank (making in all £10,000, the amount now in our hands). On receipt of this we will then give notice to the Agent-General of our lien upon this amount," and the contractors, in their reply dated 7th of March, 1885, say: "As to your giving notice to the Agent-General of my firm's assignment, of course there can be no objection to that, but I should like for choice (if you would agree) that the notice should not be given until, say, towards the end of this month; in the meantime I will assure you that no other assignment of any part of the retention fund except to yourselves either is or shall be made." As between the plaintiffs and the contractors it was clearly intended that there should be an absolute assignment of the fund, and not a mere charge upon it. The fact of this being their intention was conveyed to Sir Charles Mills. If he had asked for an inspection of the documents relied upon he would, I think, have been justified in requiring a less ambiguous and more simple form of assignment before consenting to act upon it, but by his conduct he must be taken to have waived any objection on his part to the form of assignment submitted to him. After the money had been paid to him he might have protected himself against liability by paying it into the High Court of Justice in terms of the proviso of the 6th sub-section already mentioned, but he preferred to await instructions from the Colonial Government. No question of privilege has now been raised on behalf of the Government, so that the question at issue must be decided as if it had been raised between private individuals. The contractors' letters to the plaintiffs in my opinion constituted an absolute assignment of the sum of £8,512 under the Judicature Act, as well as according to the doctrines of the Courts of Equity before and after the passing of that Act, and the fact that the term "lien" has been inappropriately used in two of the stamped letters does not prove that the assignment purports "to be by way of charge *only*." Due notice of such assignment having been given to the Agent-General no subsequent assignment could override the rights of the plaintiffs, and the Government was not legally justified in paying the money in their hands to the Cape of Good Hope Bank, even with the consent of the trustees and creditors of the insolvent estate of the contractors. The judgment of the Court must therefore be for the plaintiffs for the sum of £8,512, with interest from the date of the summons, and with costs.

Mr. Justice Buchanan said: It is common cause that this case must be decided according to the law of England. After the judgment just given by the Chief Justice, I need not restate the facts. The issue depends on the question whether or not Messrs. Firbank & Co. executed what that law would hold to be assignment of the money coming to them under the contract with the Colonial Government to the plaintiffs. It is open to doubt whether the English Courts would apply to this case the rules which, before the passing of the Judicature Act (36 and 37 Vic, c. 66), determined what amounted to an equitable assignment, or whether the statute would now be held to prevail. The equitable rules are certainly more flexible than the statutory; but I think the case may be decided under the statute. By the sixth sub-section to section 25 of the Judicature Act, to entitle the plaintiffs to succeed there must have been an "absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only," of the debt. I have not found it easy, on reference to the English decisions, clearly to define the line of demarcation between an "absolute assignment" and a "charge." It has been laid down that an "absolute assignment" need not necessarily be an equivalent to a sale out and out, while a charge is stated to be a mere appropriation of a particular fund to a particular debt. In the case of the "National Provincial Bank of England v. Harle" (6 Q.B. Div., 626), it was unsuccessfully argued that "absolute" meant unconditional, not that it must be defeasible on repayment; and that a "charge" was a mere appropriation, not passing the property. This case, which was decided by a single judge, was afterwards "distinguished" by a Divisional Court from "Burlinson v. Hall" (12 Q.B. Div., 347), and disapproved of in "Tancred

v. Delagoa Bay and East Africa Railway Company (28 Q.B. Div., 289). In "Burlinson v. Hall," Day, J., said: "A 'charge' on a debt confers rights on the person to whom the charge is given to have it enforced by assignment, not an action against the debtor, but by proceedings against the person who created the charge to assign the debt." In Tancred's case a mortgage of debts due to the mortgagor, made in the ordinary form, with a proviso for redemption and reconveyance upon repayment to the mortgagee, was held to be an absolute assignment, not purporting to be by way of charge only. In applying the provisions of the statute to the case before us, a difficulty is created by the document, duly stamped as a deed of assignment, purporting to give a "lien" on the money deposited with the plaintiffs by the Agent-General. But looking at the whole of the writing between the parties, there can be no doubt that both sides intended that there should be an absolute assignment. Firbank & Co. say so in express terms. In the absence of authority to the contrary, I think the Court might fairly look at the whole of this correspondence, and not confine its attention exclusively to the one letter which, for purely revenue purposes, was stamped as required by law. The case of "*Ex parte* Hall" (10 Chancery Division, 615), cited in argument, would seem to imply that in such a case as the present English Courts would look at the whole transaction. But even if we are confined to this one document, and endeavour to gather from it alone the true substance of the transaction between the parties, it appears to me that there was an assignment given, and not a mere charge created. There was certainly much more than a mere request, or revocable authority. The letter is not an appropriation only of the fund to the payment of plaintiffs' claim, but it gave them the right to the whole of the amount due under the contract with the Colonial Government. The word "lien" was only used because at the time of the assignment the fund was deposited with the plaintiffs themselves as bankers, but it was intended that the plaintiffs should receive the money from the Agent-General when any claims against it by the Colonial Government should be satisfied. It is admitted that no claim accrued to the Government against the fund, and that this case is now practically a contest between the plaintiffs and the Cape of Good Hope Bank, to whom the Government paid the money under indemnity. The Cape of Good Hope Bank held a clear out-and-out assignment, but it was granted some months subsequent to, and in violation of, the contract between Firbank & Co. and the plaintiffs. If, then, the plaintiffs also obtained an assignment, as theirs was prior in point of time, they are entitled to succeed. I therefore concur in judgment being given for the plaintiffs with costs.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Attorneys for the Government, Messrs. Reid & Nephew.]

SUPREME COURT.

TUESDAY, AUGUST 25.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

SOLOMON V. WOOLF.

Mr. Schreiner for the applicant; Mr. Juta for the respondent.

This was an application to make absolute a rule *nisi* granted by the Court to restrain the respondent from removing certain movable property, or injuring immovable property situated in Wynberg, registered in the applicant's name.

Mr. Juta read an affidavit of the respondent, Victor Woolf, who alleged that the applicant was possessed of no property of her own, but that she was in possession of property belonging to Victor Woolf & Co. In seeking to retain the property, deponent was acting only in the benefit of the creditors of the firm of Victor Woolf & Co., to which firm applicant's husband was indebted in the sum of £4,000. If the order were made absolute deponent would be most seriously prejudiced in an action he was instituting against the applicant and her husband. Counsel further read an affidavit of Elias Harris and Henry Cohen, to the effect that Solomon said that the property in dispute was purchased on behalf of the firm of Victor Woolf & Co., in which he was then a partner.

Mr. Schreiner read an answering affidavit.

Mr. Juta said that Mr. Woolf stated distinctly that the property belonged to the firm. His client was willing to consent to the interdict if the other side would give an undertaking not to deal with the property. The property was registered in Mrs. Solomon's name, and therefore, *prima facie*, hers, but Mr. Woolf had been in possession for the past eight months.

The Chief Justice: Is there any allegation that Mrs. Solomon intends to sell the property?

Mr. Juta said certainly, and that it was not denied that the property was to be realised for the benefit of Mrs. Solomon.

The rule *nisi* was made absolute with costs, but the Chief Justice said that certain statements had been made in the affidavits which might give the respondent a right to an interdict, and ultimately a right to have the transfer set aside. If a rule *nisi* were asked to restrain Mrs. Solomon from parting with the property it might be granted at once, but the necessity for such a proceeding might be obviated by Mr. Schreiner undertaking on behalf of his client not to dispose of the property.

Mr. Schreiner said his client was prepared to meet any action.

The Chief Justice, in giving judgment, said the rule would be made absolute with costs, but in reference to the fresh application, the Court would grant a rule *nisi* calling upon the respondent (Mrs. Solomon) to show cause, not later than 12th September, why she should not be restrained from selling the house and furniture pending an action to be forthwith brought against her, the rule to operate as an interdict as soon as it was certified to the Registrar that the costs of the application had been paid by the respondent (Mr. Woolf).

In re THE MINOR WESSELS H. MOOLMAN.

On the motion of Mr. Juta, the Court granted an order authorising the tutor dative of the said minor to join with other co-owners of certain farm, known as Buffelsbosch, in the district of Humansdorp, in a partition into defined shares on the basis of a survey already made and agreed upon.

IN THE ESTATE OF THE LATE ISAAC JUKKIE.

Mr. Joubert moved for an order authorising the Master to pay out certain moneys in this estate, amounting to £202.

The Court granted a rule *nisi*, calling upon all persons concerned to show cause on the 12th September why three-fourths of the £202 mentioned in the petition should not be paid to the petitioners, the rule to be published once in the *Government Gazette* and in a Port Elizabeth newspaper.

REGINA V. MEIRING.

Criminal procedure—Theft by embezzlement—Case remitted—Irregularity—Prisoner not served with "fresh summons"—Refusal of prisoner to plead—Conviction—Sentence—Appeal.

Mr. Schreiner for the appellant; Mr. Giddy for the Crown.

This was a motion for review, under the following circumstances: Appellant, Ryk Meiring, was charged before the Resident Magistrate of Prieska with the crime of embezzlement, in that he was alleged to have wrongfully converted to his own use the sum of £22 5s. 5d., belonging to the brothers Snyman, and collected by him on their behalf. The case was sent to the Attorney-General and remitted, appellant was found guilty and sentenced to three months' imprisonment, and ordered to be struck off the roll of agents practising before the Courts of Resident Magistrates. The preparatory examination was conducted in due form, but when appellant was brought up when the case was remitted he was not served with a summons. The point taken for review was as to whether a magistrate was not bound to issue a summons before proceeding to try a remitted case. Appellant refused to plead when called upon to do so on account of the irregularity in the proceedings.

Mr. Schreiner quoted "Regina v. Bamberger," 1 Juta, 145, and "Regina v Cooper," Buchanan 1879, 152 and contended that the conviction should be quashed on the grounds of irregularity in the proceedings.

Mr. Giddy contended that the irregularity, if any, was insufficient to prejudice the appellant. The original warrant still held good, and all that was necessary to require the presence of the accused when the remitted case was heard was that some legal notice should be given him. Such a notice had, as a fact, been sent to the appellant, who was formally told to attend before the Magistrate and stand his trial upon the charge. The exact procedure followed for many years had been observed in this case, and he was unable to find, from the records in the Attorney-General's office, that a fresh summons had been issued in any remitted case for years and years.

The Chief Justice, in giving judgment, said that the only question in the case was as to whether there was such a gross irregularity as to warrant the Court in quashing the whole proceedings. In the present case a notice was undoubtedly served upon the prisoner, to the effect that as the Attorney-General had withdrawn his indictment in the case, and remitted it for summary trial, appellant was required to attend before the Magistrate, with his witnesses, to stand his trial on the charge of theft by embezzlement. He thought the Court would be carrying technicalities to an extreme if it held that that was not equivalent to due and proper notice. Strictly speaking the form was not in all respects observed, but to all intents and purposes the notice had the effect of warning the prisoner that he was to appear and stand his trial. The notice was duly stamped and served, and the prisoner did in fact appear in court. In his opinion, therefore, there

was no such gross irregularity as to justify the Court in quashing the whole of the proceedings. The appeal must be dismissed with costs.

Mr. Justice Buchanan concurred.

Attorneys for the Crown, Messrs. Reid & Nephew; Attorney for the Appellant, Gus Trollip.]

DAHL V. VAN DER MERWE.

Mr. Schreiner for the appellant; Mr. Graham for respondent.

This was an appeal from a decision of the Resident Magistrate of Wynberg, in regard to an action in which plaintiff claimed £14 8s. from the defendant for damage sustained to a horse and harness alleged to be due to the defendant's negligence.

The appeal was dismissed with costs.

[Appellant's Attorney, D. Tennant, jr.; Respondent's Attorney, J. Hamilton-Walker.

SUPREME COURT.

WEDNESDAY, AUGUST 26.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.

JANSEN V. CONRADIE.

Trespass—Action for damages—Declaration of rights—Prescription—Land Beacons Act No. 7 of 1866, sec. 47 (*a*) (*b*).

Sir T. Upington, Q.C., and Mr. Schreiner appeared for the plaintiff, and Mr. Searle and Mr. Molteno for the defendant.

This was an action instituted by Mr. Zirk Bernardus Jansen, jun., against Mr. Gideon David Conradie for a declaration of rights and for £100 damages, alleged to have been sustained during the years 1889, 1890, and 1891 by the unlawful trespass of the defendant on the plaintiff's land. The parties to the suit are farmers living in the division of Philip's Town, and are the adjoining owners of the farms Olivenfontein and Oosthuisfontein, the former belonging to the plaintiff and the latter to the defendant. The portion of the farm Olivenfontein, upon which the trespass was alleged to have been committed, was claimed by both parties, and the defendant claimed in reconvention the sum of £100 damages for the alleged unlawful trespass of the plaintiff during the above-mentioned years. The plaintiff's property was transferred in 1889, according to a diagram annexed to the original quit-rent lease of 1882. Annexed to the declaration were several diagrams, and it was contended for the plaintiff that his boundaries included certain beacons, which the defendant denied. Plaintiff claimed a declaration of boundaries.

Defendant pleaded that in 1884 an agreement in which the present boundaries of the farms were arrived at was signed by Booysen, the then proprietor of Olivenfontein, and Venter, who at that time owned Oosthuisfontein, and that as defendant and his predecessor in title had enjoyed uninterrupted possession of the property for over thirty years, it was his by virtue of prescription. Defendant also claimed a declaration of boundaries.

Plaintiff, in reply to defendant's plea, stated that he never at any time recognised the agreement between Venter and Booysen as binding on him, that he at all times protested against it, and that it was never registered as required by law.

In examination by Sir T. Upington, plaintiff deposed that when he came into possession of the property he informed defendant that he refused to recognise the boundaries as they were alleged to exist by defendant. He had approached Mr. Conradie with a view to a friendly settlement, but defendant replied that he owned £1,500 and his house, and would not give up the land in dispute. On one occasion Conradie instituted proceedings against witness under the Land Beacons Act for trespassing on the disputed land, but the Solicitor-General refused to prosecute and he was acquitted. At another time he was charged £5 10s. 4d. poundage fees for his cattle found on the land and impounded. He paid the money but recorded his protest on the receipt.

Cross-examined by Mr. Searle: It was not true that he instituted action on account of the criminal proceedings set in motion by Conradie under the Land Beacons Act. He had consulted his lawyer a long while before that.

Mr. Wilford B. Murray, Government land surveyor, stated that at the request of the plaintiff he surveyed the farms in February last. He made an explanatory plan, in which he noted all the beacons. He compared Conradie's diagrams with those of Jansen, and found them to correspond. By a diagram made in 1824 the beacons of plaintiff's farm were shown by means of natural indications. The topography of the land supported the line as drawn by witness. He had recommended the parties to proceed to arbitration in settlement of the dispute.

Mr. C. W. Duploy said he had known plaintiff's farm since 1868. Afterwards he bought the farm, which, when he had it, had not the beacons now claimed by Conradie. When he had the farm he grazed right up to the line claimed by Jansen. In his time no mention was made to him of an agreement between Booysen and Venter.

Further evidence was given for the plaintiff respecting the position of the beacons by Mr. H. G. van der Merwe, Mr. Petrus Everts-on, Mr. John Smith, Mr. John Hendrik Badenhorst, Mr. Johannes Naude, Mr. Hermanus Carl du Preez, and Mr. Jan Louis Venter.

For the defence, Mr. Searle called

Mr. Gideon D. Conradie, the defendant, who said he bought his farm Oosthuisfontein in 1888 from Mr. Andries Venter, who then pointed out the boundaries of the farm. At that time Olivenfontein was let out on hire; the owner did not live there. He had heard some talk that the first dispute about the beacons arose during Duploy's tenancy of Olivenfontein, and the dispute was continued when Jansen entered into possession. The land within the line of beacons claimed by him had always belonged to Oosthuisfontein, and been used for stock-grazing for many years past. He had seen in Jansen's possession a copy of the agreement between Booysen and Venter, the former owners of the farms, in which the beacons were fixed as witness claimed they should be.

27th and 28th AUGUST.

Sir T. Upington, Q.C., and Mr. Schreiner appeared for the plaintiff, and Mr. Searle and Mr. Molteno for the defendant.

The hearing of this case was resumed.

Sir T. Upington addressed the Court, contending that the other side had to a certain extent abandoned its position. In his opinion, and he considered he was borne out by several witnesses, the line shown on Murray's plan was the correct one, and should be so awarded by the Court.

Mr. Searle, for the defendant, said there was a startling discrepancy in plaintiff's diagram; instead of a straight line running between Olivenfontein and Oosthuisfontein there was an angle tending outward, but no such discrepancy appeared on his client's diagram. He thought he had satisfactorily shown the Court that the plaintiff's witnesses did not know so much about the ground in dispute as those of the defendant. In respect to continuous occupation, he said he had offered much stronger evidence than the isolated assertions deposed to by the plaintiff's witnesses.

Messrs. W. B. Murray and H. G. van der Merwe having been re-examined,

The Chief Justice said the matter in dispute between the parties was whether beacon C or beacon B, on the plan of Surveyor Murray was the true boundary beacon between Olivenfontein and Oosthuisfontein, belonging to the plaintiff and defendant respectively. To decide this question, he thought the Court must be to a great extent guided by the rules laid down by the Legislature for the guidance of the Land Commissioners appointed under the Land Beacons Act. The Court had more than once intimated that these rules really embodied the laws of the country in regard to the decision of boundary disputes. Subsections *a* and *b* of section 47 of the Land Beacons Act dealt especially with these matters. If the Court relied on the diagram put in in the present case, the discrepancy was hopeless, not greater on the side of the plaintiff than on the side of the defendant. If they took the tracing from a certain point L, on to K, then undoubtedly the figures rather corresponded with the claim on behalf of the defendant; but if, on the other hand, E was taken as the starting point, then the figures would rather more correspond with the plaintiff's contention. The first question was, should they start from the point E or not? He thought, on the whole, that there was sufficient evidence that E should be taken as the starting point. He quite bore in mind the contention of Mr. Searle that red E should be taken, and in one sense he was satisfied that red E was erected before black E. Some of the witnesses, however, said that red E was only erected temporarily, and when Von Abo came to make his final survey, black E was fixed as the boundary beacon between Oosthuisfontein, Olivenfontein, and Modderfontein. An old witness, Mr. Van der Merwe, had related to the Court what had taken place when the survey was made by Rawstorne, and stated, among other things, that a peg made of olive-wood was driven into the ground, and sure enough a peg of that description of wood was found on the spot indicated. His only doubt was whether a peg of that description would last from 1824 till 1861, but he had heard that olivewood lasts a very long time indeed, being one of the hardest woods to be found in the Colony; therefore it was quite possible that a peg like this would resist the influence of the climate for thirty-seven years, especially as it had not been disturbed in any way. He thought they might fairly start with E as a corner beacon, as by doing so there was less discrepancy between the angles of the three farms. Having fixed upon E, he considered that if they applied the tracings to the diagrams, C might be taken as another corner beacon. In regard to C, old Mr. Van der Merwe swore that he saw the letter "B" chipped on a rock, and he also said that his father told him that this was meant to indicate a beacon. If Mr. Van der Merwe was to be believed he thought there was no doubt whatever that Von Abo intended the point C to be the beacon to indicate the boundary between Oosthuisfontein and Olivenfontein. No actual beacon was found there, but if the letter "B" was chipped on the rock then there would be no necessity for erecting a beacon at that particular spot. Mr.

Searle had argued that a beacon should have been erected for the guidance of shepherds and others who could not read, but he understood the rock, or krantz, was a very prominent point, and therefore there was no necessity for erecting a beacon on that spot. Now, if Von Abo did intend point E to be a corner beacon, then at all events they had the nearest approach to carrying out the sub-sections of section 47 of the Land Beacons Act. The Court had no evidence before it to prove that Von Abo did point out the exact spot, but there was the evidence of Du Preez and others as to what they saw. He was satified, therefore, that these were the original beacons. They could not succeed in setting aside these old beacons unless he could show that they had been interfered with within a period of thirty years. No doubt strong evidence had been given on behalf of the defendant as to actual occupation, but there was also strong evidence given on that point in another way. One Naudé stated that he had been instructed by old Du Preez to place the Modderfontein beacon in a line between E and C, and that would be exercising the right of ownership. He was satisfied that C ought to be adopted as one of the beacons. There was only one other question which gave him some difficulty, and that was whether the line should be continued from C to K, or whether the line should not be taken from C to A, and thence to K. That would perhaps be the most equitable course, but he saw nothing in the evidence to warrant such a course. Therefore, on the whole, he had come to the conclusion that they should adopt the beacons claimed by the plaintiff, viz., from E to C and from C to K. Judgment was therefore to the effect that the line and proper boundary between Olivenfontein and Oosthuisfontein was the line K to C and C to E (black), according to the diagram of Surveyor Murray. Judgment would be given for plaintiff with costs.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. van Zyl & Buissinne.]

SUPREME COURT.

THURSDAY, AUGUST 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

BAARTMAN V. VAN NIEKERK.

On the motion of Mr. Watermeyer, the final adjudication of defendant's estate was ordered.

STURK AND CO. V. MOODIE.

On the application of Mr. Molteno, provisional sentence was granted on three promissory notes for £170 12s. 6d.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Willem Diederick Weeber and Carl Willem Mego.

GENERAL MOTIONS.

WARD V. GERALD & CO.

Mr. Shiel moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action for damages for breach of contract.

The Court made the rule absolute, and appointed Mr. Shiel counsel and Mr. David Tennant, jun., attorney.

PETITION OF BESSIE PARTRIDGE.

On the application of Mr. Graham, the Court granted a rule *nisi* calling upon applicant's husband to show cause why she should not be permitted to sue him *in forma pauperis* in an action for divorce.

IMROTH V. LIQUIDATORS OF THE CAPE OF GOOD HOPE BANK.

Mr. Searle for plaintiff; Mr. Juta for respondents.

Mr. Searle said that this application was made by Imroth for an order setting aside a certain attachment, granted on the 6th August at the instance of the respondents, of the interest of one Lawrence under a certain agreement made between Ward and Wessels in connection with the Wesselton Mine, and also under an agreement made between Lawrence and Ward. The Court would remember that in the course of the trial Lawrence gave evidence in respect to money advanced to Ward. On the 8th February last, Lawrence disposed of

his share to Imroth for the sum of £5,000; the latter paying down £2,500 in cash, and the other half being handed over to Messrs. Haarhoff & Hull, who were the trustees of the money which was to be handed over to Lawrence when he had given his evidence in the case. As soon as the required evidence was given the £2,500 was paid to Lawrence. On the 24th and 29th June the cession was made formal and complete by the execution of certain documents.

Mr. Searle contended that Lawrence had actually parted with all right, title, and interest in his share before the matter came into court, and that he had actually received the money for his share, there had been a *bona fide* cession to Imroth who had no notice of *mala fides* on the part of Lawrence; and consequently there was nothing for the bank to attach.

Mr. Juta was heard for the respondents.

The Chief Justice said that in the opinion of the Court there had been an out-and-out cession by Lawrence to Imroth, consequently there was nothing to attach, and therefore the order must be discharged, respondents to pay the costs.

Mr. Justice Buchanan concurred.

IN THE INSOLVENT ESTATE OF JOSEPH GRADY.

Insolvency—Ordinance No. 6 of 1843, sec. 49—Written permission given insolvent to trade in his own name and for his own benefit—Property acquired subsequent to surrender and before filing liquidation account—Fire Policy—Cession—Warner's Assignees v. Warner's Trustee (4 Juta, 227) commented upon and distinguished.

Mr. Schreiner appeared for the applicant (the trustee); Sir T. Upington, Q.C., for the respondent.

This was an application to make absolute the rule *nisi* interdicting the payment to the insolvent by the South British Insurance Company of a claim under a fire policy, pending the filing by the trustee of an account in his estate. The application raised an important and interesting point, viz., as to the effect of written permission given by a trustee to an insolvent to trade in his own name and for his own benefit.

The insolvent, on the strength of the permission given him to trade in his own name, borrowed certain moneys from one Kossoth, and again embarked in business. As a security for the repayment of his loan, the insolvent ceded to Kossoth his stock-in-trade and other effects, and also a policy of fire insurance effected on his stock. Some time after this cession a fire occurred on insolvent's premises, in respect of which he became entitled to the sum of £80 under his policy. This amount was now claimed by the trustee as against the insolvent and Kossoth.

Sir T. Upington, Q.C., in applying for discharge of the rule, referred to the case of "Warner's Assignees v. Warner's Trustees" (4 Juta, 227), and remarked that the present case was clearly distinguishable from Warner's case, in which no written permission to trade had been given. In the present case, not only had written permission been given, but it was expressly stated that the insolvent could trade for his own benefit. If the trustee was held entitled to the money in this case, on the same principle creditors might claim the daily profits made by any insolvent to whom permission had been given to trade in his own name. The trustee was estopped by his own act. The rule should be discharged.

Mr. Schreiner: The effect of Warner's case has been misjudged. By sections 48 and 49 the insolvent's estate and rights vest absolutely in his trustee, and the law equally applies where permission to trade has been given in writing or not. The written consent referred to in section 71 merely protects the insolvent from criminal consequences. The doctrine of estoppel does not apply. There has been no contract inasmuch as there has been no consideration.

The Chief Justice referred to "Malan and Van der Merwe v. Secretan, Boon & Co." (Foord, 94).

Counsel referred to the 127th section, and contended that the law was clear, and that the rule should be made absolute.

The Chief Justice, in giving judgment, said: In the case of "Warner's Assignees v. Warner's Trustee" I am reported to have said: "It is needless to inquire what the relative rights of the parties would have been if such an authority in writing had been given." In the present case the question which was then left undecided must be now decided, viz., whether the trustee having himself given permission to trade in writing is now entitled to recover moneys earned by the insolvent by virtue of this very permission to trade. The 49th section of the Insolvent Ordinance, after treating of the trustee and of the incapacity of the insolvent, goes on to say: "And no such insolvent shall be deemed or taken to have any power to bind any such last-mentioned person or the insolvent estate in him vested by any sort or description of dealing, contract, or transaction whatsoever, unless the same shall have been entered into by virtue of an authority to that effect from such person in writing." Now this clearly means that he shall be deemed to have the power to bind such last-mentioned person if the authority is in writing. It follows as a necessary

consequence that it was the intention of the Legislature that the trustee shall be bound if he has given the authority in writing. In the present case, by virtue of such permission the insolvent has acquired and disposed of certain property, and has entered into certain arrangements with Kossoth. It would be contrary to every principle of law and justice that the trustee should now be entitled to claim this property. It is no doubt true that our law does not recognise the doctrine of estoppel to the extent that the English law does, but our law does recognise undertakings of this nature, although no consideration was given for such undertaking—and it may be set up as a defence, and therefore the trustee is not entitled to claim the property. It is not necessary to decide what the rights of creditors may be—whether special creditors have rights under section 127. This is not a case of special creditors suing, but a case in which the trustee alone sues, so that our decision comes to this, that the trustee having given this permission is prevented from recovering this money, and the rule must be discharged with costs.

Mr. Justice Buchanan: I concur, and I put it on this ground, that the trustee having given a written authority to trade, the provisions of the 49th section bind the trustee to contracts entered into with third persons. The trustee must, after consent had been given, recognise the arrangements made by the insolvent with third persons. As to whether creditors may sue, that is a question which does not arise here.

The Chief Justice: I only wish to add that it is quite clear, from the general tenor of my judgment in Warner's case, that it was only because of the express provisions of the Ordinance requiring the permission to trade to be in writing that I consented to the judgment.

PETITION OF JOSEPH W. ROSS.

Mr. Giddy applied for a rule *nisi* calling upon the wife to show cause why the petitioner should not be admitted to sue her *in forma pauperis* in an action for divorce by reason of her adultery.—The rule was granted.

SUPREME COURT.

FRIDAY, AUGUST 28.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

VAN ZYL V. DE BEER.

Transfer—Action for—Written agreement of sale and purchase—Cancellation.

Mr. Searle and Mr. Tredgold appeared for the plaintiff, and Mr. Schreiner for the defendant. This was an action for transfer. The parties to the suit both reside in the district of Piquetberg.

The declaration alleged that in March last the defendant, in her capacity as executrix testamentary under the joint will of her late husband and herself, undertook to sell, and the plaintiff to buy, for the sum of £850, the farm Matroosfontein, situated in the district of Piquetberg, and at present occupied by the defendant. The agreement to purchase was in writing, a copy of which was attached to the declaration.

The defendant in her plea admitted having signed the agreement referred to in the declaration, but alleged that it had been cancelled on the 20th March by mutual consent. Upon these facts issue was joined.

Mrs. M. M. S. de Beer, the defendant, examined by Mr. Schreiner, stated that she knew the plaintiff Van Zyl, who was a good friend of hers until lately. Her late husband died in 1887; they had been married in community of property. Plaintiff and herself became engaged early in March last. On the 5th of the same month she signed a document agreeing to a sale of the farm for £850 to the plaintiff. After she had signed the document, and given it to the plaintiff, he promised to return on the following day to discuss the matter more fully. Her late husband and herself made a mutual will in 1868, which was registered in the Master's Office. In 1885 another will was made, by which the farm Matroosfontein, the subject of the present action, was bequeathed to her children. Plaintiff returned on the 20th March with Mr. Peterson, and said that he had come to put an end to the sale. Witness said that she was very glad, as her children were dissatisfied. Plaintiff said he had not the agreement with him, but that he would bring it back some other time. One of witness's sons was present during the conversation. Plaintiff never brought back the contract of sale, but on the 21st April he brought another document, written in lead-pencil, and asked witness to write it in ink and sign it. Witness

refused, as she thought the sale had been cancelled. Plaintiff came again in May, and proposed that witness should sell the farm, as he said he had found that she could do so. He also said that they could marry in community of property, and make a will leaving their property to their children. She refused to accede to this request.

Cross-examined by Mr. Searle: She told Van Zyl that there was another will in existence. The farm Matroosfontein was valued at £500; £850 was not a high price for the farm, and she would not have accepted that sum only for the fact that she and Van Zyl were engaged at the time the offer was made. There was a bond of £700 on the farm. She claimed the right to sell the whole farm.

Michiel Johannes de Beer deposed that plaintiff told him that he intended to cancel the sale, as he heard that the place was bequeathed to his (witness) brother Conrad.

Guillaume C. Prideaux deposed to having seen plaintiff at Matroosfontein, and having heard that he meant to throw the sale over.

Pieter Adriaan van Zyl deposed that he knew Mrs. De Beer, and was once on very good terms with her. On the 7th March he visited her and proposed to purchase Matroosfontein, and on the 12th the "koop brief" was signed by both parties to the contract. He then went to Rosibaai to see Mr. Stephan, and arranged for the purchase money of the farm. On the 20th March he went to Matroosfontein, and saw the defendant, who asked him if he had got the money, and he said yes. She told him he need not have troubled himself, as the farm was bequeathed to her sons. He obtained a copy of the late Mr. De Beer's will. He saw the widow again, and she gave him a letter to show Stephan that the farm was bequeathed to her children. He made a declaration of purchase in May, after he had seen a copy of the will, and he told her that it would be necessary for her now to go before a justice of the peace and make a declaration of seller. He was always in a position to tender the purchase money. When he made the contract he knew about the litigation over the water at Matroosfontein. He was engaged to the widow, but when he brought her a copy of her late husband's will the engagement was broken off by the lady. He knew nothing about a second will, by which the farm was bequeathed to the children. He had been held liable by Stephan for interest on the borrowed money.

Cross-examined: He was not a farmer, but formerly carried on business at Clanwilliam as a shopkeeper. He had known the widow since January last, and became engaged to her when the matter of purchasing the sale came up. He never spoke to Michiel de Beer on the subject of the purchase of the farm, neither did he speak with Peterson, of Piquetberg-road.

Edward J. Cordey, manager for Stephan at Berg River, deposed that the money had always been ready for plaintiff, whenever he felt inclined to purchase the farm.

Johannes G. van Zyl deposed that on the 25th March he went to Malmesbury and saw Mr. Van Noorden, according to his father's instructions.

Counsel having addressed the Court,

The Chief Justice said the plaintiff's case had been hopeless from the very beginning. The defendant was the executrix of the estate of her late husband, and in that estate there was a farm. The plaintiff got into her good graces and then induced her to sell the farm. It was unnecessary to inquire whether the price offered was a good one or not. He must say at once that were a sale effected under such circumstances the Court in any case would require very strong evidence of cancellation, but in this case there was complete evidence of cancellation. In the letter which the plaintiff asked the defendant to write for presentation to Stephan, she was requested to say that the farm was bequeathed to her children, and that therefore it would be unnecessary for him to take any further steps in obtaining the purchase money. This letter was wholly consistent with the fact that there had been a previous cancellation. Such a letter could not have been written unless it had been clearly understood between the parties that there was such a cancellation. Judgment must be given for defendant with costs.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT

MONDAY, AUGUST 31.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

REGINA V. ZWARTLANDZANA

Mr. Giddy remarked that in this case the prisoner was indicted for assault with intent to do grievous bodily harm by striking his wife with a stone. At the hearing of the case the prisoner pleaded guilty of assault, but not with the stone produced. The case was remitted by the Attorney-General, under Act 12 of 1860, as amended by Act 43 of 1885, and the prisoner was sentenced by the Magistrate to twelve months' imprisonment with hard labour. On the case coming on review before the Chief Justice, his lordship expressed an

opinion that the plea of the prisoner was not really one of guilty of assault with intent. The Attorney-General consented to a withdrawal of the original remit, and the Court now agreed that all the proceedings subsequent to the remit should be quashed. The Attorney-General subsequently remitted the case, under Act 43 of 1885, for assault with intent.

PROVISIONAL ROLL.

GROENEWALD'S EXECUTRIX V. BENEKE.

On the motion of Mr. Schreiner, provisional sentence was granted on a mortgage bond for £600, and the property declared executable.

BOND V. BOND.

On the application of Mr. Searle, the final adjudication of defendant's estate was ordered.

VAN DER BYL AND CO. V. ZUIDMEER.

On the motion of Mr. Watermeyer, provisional sentence was granted for £59 6s. 6d., due on three promissory notes. The claim for commission was disallowed.

REHABILITATION.

On motion from the Bar, the rehabilitation of the following insolvent was granted: Jan Abraham du Plessis.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JACOBUS A. BURGER.

Mr. Schreiner moved for an order making absolute the rule *nisi* for the cancellation in the Deeds Registry of certain mortgage bond for £3,000, passed by Barend J. J. Burger on the 16th May, 1878, in favour of the said Jacobus A. Burger, since deceased.

The order was granted.

PETITION OF WILLIAM J. CROOKS.

Mr. Shiel moved for an order making absolute the rule *nisi* for the registration in the name of the estate of the late John Crooks of certain two pieces of land situated in Walmer and Port Elizabeth, now registered as owned by Francis and W. Lloyd.

The order was granted.

PARTRIDGE V. PARTRIDGE.

Mr. Graham moved for an order making absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action for divorce against the respondent by reason of his adultery.

The order was granted.

EATON V. EATON.

Mr. Tredgold moved for the removal of the suit instituted against the respondent by his wife, for restitution of conjugal rights, for trial at the next Circuit Court to be held at Queen's Town.

The order was granted.

PETERS V. PETERS.

Mr. Jones made application for an order making absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties by reason of the respondent's failure to receive the applicant, or return to her, as ordered by the Court.

The order was granted.

TRUTER V. TRUTER.

Mr. Watermeyer applied for an order making absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action for restitution of conjugal rights, by reason of her husband's malicious desertion.

The order was granted.

WHEELER V. WHEELER.

Mr. Molteno applied for an order making absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties by reason of the respondent's failure to comply with the decree for restitution of conjugal rights.

The respondent who appeared in person, said that her husband had misconducted himself, and she claimed the expenses of her recent confinement. She declined also to go to Simon's Bay, where her husband worked, because the climate did not agree with her.

The Chief Justice said if the child was the husband's, of course he must contribute towards its support. As the respondent had made certain allegations against her husband, the case must stand over until Thursday next for further evidence.

(3rd SEPTEMBER.)

The hearing of this case, upon the application to make absolute the decree of divorce, was resumed. Mr. Molteno appeared for the petitioner, the husband.

Petitioner, recalled at the instance of the Court, denied the wife's allegation that he had misconducted himself with another woman, and offered to contribute 5s. per month to maintain the child of which he was alleged to be the father.

The respondent, Mrs. Wheeler, stated that she had witnesses to prove her husband's misconduct.

Mr. Justice Buchanan: How many children were there of the marriage?

Wheeler: Four, my lord; three are dead.

The Court granted the decree of divorce, defendant to have the custody of the child, and petitioner to pay 5s. per month towards its maintenance until the age of fourteen is reached, first payment forthwith and payment thereafter on the first of each month.

IN THE ESTATE OF PETRUS JACOBUS HUGO.

Mr. Graham applied, on behalf of the executors, for the appointment by the Court of some disinterested person to represent the minor heirs in regard to the division of the property bequeathed. He would suggest that Mr. E. R. Syfret be appointed.

The Chief Justice considered this would be an unnecessary expense, but the Court would accede to the suggestion of counsel and appoint Mr. Syfret.

PETITION OF FREDERICK DYER.

Mr. Jones applied for an order making absolute the rule *nisi* authorising the registration of title in the Deeds Office at King William's Town, in petitioner's name, of certain piece of ground, marked No. 3, in the village of Keiskama Hoek.

The order was granted.

CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. VAN LIER'S EXECUTORS.

Mr. Schreiner suggested, and it was ordered, that this matter stand over until the case of Watson's Executors v. Watson's Heirs came on for hearing.

IN THE ESTATE OF THE LATE HERMINA M. OVERBEEK.

Mr. Juta moved for an order making absolute the rule *nisi* for the payment in aid of the support of Albertina Overbeek and her child, the inheritance devolving upon Gerhard E. Overbeek and his wife, the said Albertina Overbeek, as heirs *ab intestato* in the estate. Mr. Juta said that Mr. Overbeek's whereabouts was not known, but he was believed to be in Australia.

The order was granted.

In re CAPE STOCK-FARMING COMPANY, LIMITED.

Winding-up Act—No. 12 of 1868—Company placed under operation of on application of executors of deceased shareholder.

Sir T. Upington, Q.C., moved, on behalf of the executors of the late Mr. J. B. Evans, a debenture and shareholder, that the company be placed under the operations of the Winding-Up Act of 1868, and that an official liquidator be appointed to act thereunder. Sir T. Upington said that this was a joint-stock company, registered in England, it had a capital of £100,000, in 100 shares of £1,000 each, on which shares £50 had been paid up. The company now owed £43,000 on debentures, the greater part of which matured on the 30th June last. The sum of £11,899 was owing on current liabilities, and the company was worked at a loss. The late Mr. John B. Evans held debentures to the value of £6,250, which matured on the 30th June last, and 198 shares, on which there remained unpaid £50 per share. There were two other shareholders in the Colony, who held sixty shares between them. The estate of the company would not realise sufficient to pay the debentures and current liabilities, and the paid-up capital of £50,000 would be a total loss to the shareholders. Under these circumstances, it was just and reasonable that the company should be wound up; and he suggested that Mr. C. J. Brugmann, manager of the Midland Assurance and Trust Company, should be appointed official liquidator.

The Chief Justice inquired if the company had a representative in this colony.

Sir T. Upington replied that there was a manager here, but Messrs. McDonald, Vardy & Co., of Port Elizabeth, really had the management in their hands. The debentures had been presented and dishonoured. The security of the Trust Company would be offered, and more if required.

The Chief Justice said the Court would grant the application and appoint Mr. Brugmann official liquidator, notice to be given to the manager of the company.

In re PORT ELIZABETH TOWN COUNCIL.

Mr. Searle moved for an order making absolute the rule *nisi* for payment to petitioners of the purchase price of certain lots of land bought by W. S. Craik, John Dicksen and John Passmore, but not paid for and subsequently sold in execution for the rates due thereon, out of the proceeds lodged in the hands of the Master under the provisions of the Dereliot Lands Act.

The order was granted.

PETITION OF JULIA FRANCES BERRY.

Mr. Molteno applied for leave to sue *in forma pauperis* in an action against applicant's husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The order was granted.

PETITION OF JOHN BUTLER

Mr. Watermeyer moved for an order making absolute the rule *nisi* for registration of title in the name of the petitioner of certain piece of land, No. 95, Paulet-street, Somerset East, now registered in the name of the insolvent estate of Lloyd Evans Mesham.

The order was granted.

IN RE THE ESTATE OF THE LATE A. G. H. TINDALL.

Mr. Schreiner made application on behalf of the official liquidators of the Cape of Good Hope Bank for an order for the liquidation of the estate of the late A. G. H. Tindall, of East London, the estate owing to the bank the sum of £250.

The order was granted.

MARAIS V. LANGFORD.

Appeal—Costs—Act 5 of 1879, sec. 14.

Mr. Schreiner appeared for the applicant and Mr. Searle for the respondent.

This was an application for an order requiring the respondent to provide security for the judgment and costs in the Courts below and costs in this Court in the appeal set down for hearing this day.

The facts of the case appear sufficiently from the reasons of his lordship the Judge-President of the High Court, which are as follows: "In this case the plaintiff sued the defendant before the Resident Magistrate of Kimberley for damages sustained by reason of his neglecting to send certain notices to the Civil Commissioner as he was required to do, in his capacity of poundmaster, by section 18 of Ordinance 16 of 1847. The defendant excepted to the summons apparently on the ground that the section in question was repealed by Act 1 of 1857; the exception was sustained by the Magistrate and the plaintiff appealed. The Magistrate omitted to furnish the Court with reasons for his decision, and the respondent declined to avail himself of a suggestion from the Court that he should instruct counsel to argue the point of law involved in the appeal. The exception as based on the Act of 1857 was technically bad, as this Act is repealed by Act 40 of 1889, but section 5 of the Act of 1857, on which the respondent appeared to rely, is substantially re-enacted by section 216 of the later Act. The Court, however, was of opinion that this section did not repeal section 18 of the Pound Ordinance requiring the notices to be sent to the Civil Commissioner. It merely enacted that the method of publication should be as directed by the Divisional Council, anything in section 19 of the Pound Ordinance notwithstanding; and the effect of the two sections taken together seemed to be that the notices should still be forwarded by the poundmaster, as directed by the Pound Ordinance, and should then be published in such manner as the Divisional Council should direct. This construction also appeared to be in accordance with the tenor of sections 2 to 4 of the repealed Act of 1857. The case was therefore remitted to be heard on the merits, leaving the plaintiff to prove that he had sustained damage by reason of the alleged neglect of the defendant."

Mr. Schreiner, for the applicant, contended that the respondent was bound to give security for costs. Counsel referred to "Hilpert v. The Castle Packets Co." (6 Juta, 26).

The Court held that the applicant had mistaken his remedy; that he should have proceeded under Act 5 of 1879, section 14, and refused the application with costs.

TRUTER V. TRUTER.

Mr. Watermeyer appeared for the plaintiff; the defendant in default.

This was an action for restitution of conjugal rights brought by the plaintiff, Mrs. Truter, against her husband.

Mrs. C. J. Truter, in examination, deposed that she was plaintiff in this case, and that she was married on the 19th January, 1874, at Malmesbury. In June, 1882, her husband deserted her and proceeded to Cape Town, and thence to Namaqualand. She had received no support from him since his desertion. There were five children by the marriage, one of them being now dead. In 1882 and 1886 she received letters from him in answer to her appeals for support. There was money coming to her husband in Malmesbury. He was addicted to drink before he left her. The eldest child was now sixteen years of age and helped to support the family.

The Court granted the order, calling upon the defendant to show cause why he should not return to, or receive the plaintiff on or before the 1st November next, and failing which, before the first day of next term to show cause why a decree of divorce should not be granted; why plaintiff should not have the custody of the

children; why the joint estate should not be divided; and why he should not pay the costs of this action.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne.]

POTGIETER'S EXECUTOR V. POTGIETER.

Mr. Schreiner appeared for the plaintiff; the defendant in default.

This was an action for recovery of £49 8s. 8½d., due to the estate of the late C. F. Potgieter, as his share of certain mohair. There was a claim in reconvention by defendant, nephew of deceased, for £128, said to be due as his share of certain moneys realised by the sale of ostrich feathers for joint account, and paid by the defendant to the credit of the deceased in the Standard Bank. The defendant, however, did not appear at the trial, and after proof of notice of trial to his attorneys, the Court granted judgment for the plaintiff as prayed with costs, and absolution from the instance with costs with regard to the defendant's claim in reconvention.

The Court intimated that the executor would now be justified in proceeding with the liquidation of the estate.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret.]

SCHAKOFSCO V. VAN NOORDEN.

Damages—Action for—Alleged partnership.

Mr. Searle appeared for the plaintiff, and Mr. Juta for the defendant.

This was an action instituted by Mr. Max Schakofsco against Mr. E. H. van Noorden for £500 damages alleged to have been sustained under the following circumstances, as set forth in the declaration, from which it appeared that in or about March, 1891, plaintiff and defendant entered into a verbal agreement of partnership upon the following terms and conditions: The defendant agreed to advance the sum of £2,500 for the purpose of carrying on a business in Cape Town for the manufacture and sale of tobacco and snuff in partnership with plaintiff, the said sum to be expended in the purchase of machinery and otherwise developing the said business, the defendant to have control of the financial affairs of the said business, the plaintiff to superintend the practical working and management of the same, and to draw the sum of not more than £15 a month out of the said business, the said agreement to continue in force and the said business to be carried on for three years. Plaintiff also agreed to let defendant have one-fourth share in the profits of the cigarette manufactory at that time carried on by plaintiff under the name of J. J. Max & Co., and it was further agreed that defendant should assist in the supply of tobacco, and should advance certain sums of money amounting to about £100 in order to satisfy the liabilities of plaintiff's firm, J. J. Max & Co. It was subsequently agreed that plaintiff and defendant should carry on a cigar manufactory in Cape Town, and that the profits of the same should be equally divided between the partners. Thereafter, on or about April, 1891, the defendant refused to satisfy the debts of J. J. Max & Co., or to carry out the other conditions above referred to, and further took possession of certain assets of the said business, to wit, certain cigarettes, tobacco and cigars, and the balance-sheets and other documents belonging thereto, and refused and still refuses to give up the same or to allow plaintiff to have access thereto, or to render a proper account of the said assets. The defendant further repudiated the said agreement, and refused to carry out any of the terms thereof. By reason of the said wrongful acts of the defendant, and by the said breach of contract, plaintiff alleged that he had sustained damages in the sum of £500, which he claimed, with costs of suit.

The defendant, in his plea, denied the partnership referred to in the declaration, and repudiated the alleged agreement. The defendant also specially pleaded that in February last, the plaintiff being indebted to him in the sum of £17 16s. 8d., and being unable to pay it, or to obtain tobacco for carrying on his business, it was agreed between the parties that the defendant should supply the plaintiff with tobacco, and also advance him certain weekly sums of money; that the plaintiff should manufacture cigarettes which were to be sold by the parties; that the plaintiff was to pay in all sums received for cigarettes sold to the defendant, and that at the expiration of one month, the period for which this agreement was to last, after deduction of the money due by the plaintiff, the price of the tobacco supplied, and the weekly sums advanced, the defendant was to receive a sum equal to one-fourth of the profits arising from the said sales. In pursuance of the said agreement the defendant supplied tobacco and advanced moneys, and the plaintiff manufactured and sold cigarettes and paid to defendant certain moneys. During the said period the parties agreed that the defendant should supply the plaintiff with tobacco for cigars, and that the plaintiff should return to the defendant the value of the tobacco in cigars, calculated at 8s. a hundred, any surplus to belong to the plaintiff, and the defendant did supply certain tobacco, and the plaintiff returned certain cigars. The plaintiff did not pay all moneys received by him from the said sales, and on the expiration of the said period of a month the plaintiff neglected and refused to render an

account of the moneys so received by him, or to come to a settlement with defendant in terms of their agreement and the defendant refused to continue the said agreement as he was entitled to do. Wherefore the defendant prayed that plaintiff's claim might be dismissed with costs. The defendant also claimed in reconvention that the plaintiff was indebted to him in various sums of money and for the value of tobacco supplied, as per an account attached to the plea. Defendant finally prayed for a statement of account and for judgment for such sums as he might be found entitled to thereon. Upon these pleadings issue was joined.

Max Schakofsco, examined by Mr. Searle, deposed that he had been in the Colony nearly three years. He had been with Allen & Ginter in London for seven years, and therefore was thoroughly acquainted with the manufacture of cigars, cigarettes, and snuff. Last year he carried on business in Burg-street with one Curtis, but that partnership was closed in November last. He first became acquainted with defendant about seven months ago, and had certain transactions with him. Defendant had a snuff and tobacco manufactory in Loop-street, under the name of De Jongh. He became indebted to defendant for tobacco, and passed a promissory note for £17. Defendant came to him and asked for the money, and he explained to him that he was short of money, as his traveller, Nathan, had bolted with some money belonging to him. He asked witness if he could improve the quality of Colonial tobacco, and he said yes, but it would require very expensive machinery. Defendant then said he had an extensive business in Loop-street, and would like to get hold of a man who understood the tobacco trade as a working partner. In reply to a question, he said that the machinery would cost between £700 and £800. Defendant then asked him how much he would require to carry on a wholesale tobacco business, and he said about £2,500 or £3,000. The Colonial tobacco was good enough, but wanted machinery to take the nicotine out of it. Defendant then asked him if he had any liabilities, and he said about £100, and he then agreed to take witness as a partner and meet these liabilities, which witness was to pay off by instalments. He was to draw £15 per month for the first six months, and the agreement was to endure for three years. The agreement was not signed, as defendant had to go off somewhat hurriedly to a sale at Piquetberg. Until the machinery arrived, defendant was to receive half-profits from the cigarette business. When defendant returned from Piquetberg witness asked him about the machinery, but he gave evasive answers. He put up machinery for defendant in order to treat Colonial tobacco, and it turned out a great success, the tobacco being sold in quarter-pound tins. After that time the cigarette business was carried on, the defendant supplying the tobacco. Witness had 200 lb. of tobacco in bond, but it was cleared by defendant after the partnership was entered into. Dawes and Murray & St. Leger supplied labels and wrappers, but witness had not defrayed these accounts. He knew Meeser, who was to have been employed to travel, on a commission of 10 per cent for cigarettes, and 5 per cent. for cigars, tobacco, and snuff. By arrangement with defendant, witness paid the wages of the cigarette hands on Saturdays, and rendered periodical accounts The rupture in the partnership occurred on the presentation of a promissory note presented by the Loan and Mortgage Company in connection with the clearing of the tobacco out of bond. Defendant said he had better go bankrupt, and he (defendant) said he would go round to the creditors and try to induce them to accept 2s. 6d. or 5s. in the £. This witness refused to do. He had given defendant a recipe for the treatment of tobacco, and on his applying for it, he ordered him out of his office. Witness had trained several coloured girls to the business, but when he got into difficulties defendant employed all these girls. He also asked defendant to let him see the balance-sheet, but this he also refused to do. Since he discontinued the business he had been out of employment. At the time defendant made the offer of partnership his business was steadily increasing. When his goods were attached by the messenger of the Court he calculated the value of the goods at between £30 and £40. The recipe for the treatment of tobacco was of great value to any manufacturer. It was not true that he had withheld moneys belonging to defendant, or that he had refused to render an account.

Cross-examined: Cohen was not present when the partnership was entered into. He kept books, but he had not brought them to the Court. If at the time of the partnership his creditors had pressed him he could have paid at least two-thirds of his liabilities. He could have gone on without the tobacco in bond, because he purchased small quantities in town. The business of De Jongh, he believed, was a very old-established one He saw the written agreement, but it was never completed, not having been stamped. Defendant was to receive a quarter of the profits on the cigarette business. He (witness) gave evidence in a case in which he was sued by Palmqvist for certain moulds supplied from his shop. The defence set up was that as Van Noorden had purchased the moulds he should be held responsible. He looked upon defendant as the "Co." in Max & Co. He was not a servant of the defendant, as he never received any wages from him, but he had received money on account

of the partnership. Cohen never introduced witness to defendant. He kept no books, defendant being the financial partner. He received 9 lbs. of tobacco daily from defendant, which turned out about 4,500 cigarettes. It was not true that Cohen had to manipulate the tobacco over again which he had treated. It was not true that an arrangement was made to supply cigars at 8s. per 100. The machinery was never sent for, defendant promising to do so when witness had relieved himself of his liabilities by compromising with his creditors, or otherwise going insolvent. When his goods were attached for rent he did not set up the partnership as a defence. He had given defendant an inventory of the stock and fixtures before the partnership was entered into. The tobacco for the manufacture of the cigarettes was purchased on the partnership account. The damage he had sustained was that his cigarette business had been closed, and he could neither obtain credit nor employment.

Re-examined: After the action brought by Palmqvist defendant took steps to appeal against the decision of the Magistrate. The price agreed upon for the cigars was 15s. per 100, less 5 per cent. There was no person present when the partnership agreement was entered into.

F. E. Allman, clerk in the Magistrate's Court, deposed that an appeal was noted by Van Noorden in the Palmqvist case.

By permission of the Court, Mr. Juta called

I. Cohen, who deposed that he knew both plaintiff and defendant. He was in the tobacco trade, and knowing that defendant wanted a practical man, he mentioned plaintiff's name to him. The result was an interview, and an arrangement was come to, at which witness was present. The arrangement was that defendant was to supply plaintiff with tobacco at 6s. 8d. per lb.; that on Saturdays defendant would send plaintiff between £3 and £4 for the payment of himself and the girls; that the cigarettes when made were to be sent to defendant's place; that plaintiff was also to sell cigarettes, and hand the money over to defendant; that defendant was to get one-fourth of the profits, after the price of the tobacco and the wages had been deducted. Defendant said it would be as well to try this arrangement for a month. He was employed by plaintiff to make cigars, and obtained the necessary moulds, &c., from Palmqvist. The tobacco treated by plaintiff was unfit for consumption. He regarded himself as being employed by plaintiff, as he paid him.

Cross-examined: He got the leaf tobacco for the cigars from Sturk & Co. Cigars could be produced for 8s. per 100. He knew nothing about the recipe given for the snuff. Plaintiff was going to sell the smoking mixture, but he did not know what arrangements had been made between the parties. The labels obtained from Murray & St. Leger were sent to plaintiff's place in Burg-street. As a matter of fact no tobacco was prepared, with the exception of one tin, which had been manipulated by plaintiff.

(SEPTEMBER 4th.)

The hearing of this case was resumed, Mr. Searle appearing for the plaintiff, and Mr. Juta for the defendant.

Mrs. Ada Maber, an employé at the Burg-street shop of Max & Co., said there was some smoking mixture in tins at the store—seven or eight tins were exposed in the window. She was present at an interview between Meser and the plaintiff and defendant. On that occasion Meser was handed some tobacco, cigars, and cigarettes, and Van Noorden said he would give him samples of snuff next day. She remembered samples of tobacco coming from Oudtshoorn. They were sent for by Van Noorden and Max. The tobacco which was sold was prepared at Van Noorden's, Van Noorden paid the wages of the girls. She understood she was working for Max and Van Noorden together.

By Mr. Juta: The tins of tobacco were sold. They always called Shakofsco "Max," under which name he traded.

Mr. H. Dawes, photographic engraver, deposed that he printed labels for cigarettes, and made designs for the yellow labels for tobacco in boxes He printed and supplied 20,000 labels for cigarettes. He presented the account for the labels to Van Noorden, and he paid by cheque.

By Mr. Juta: He applied twice for the money. It was not true that on the first occasion Van Noorden refused to pay the money. He simply asked witness to call again.

Mr. Johannes Meser stated that he remembered meeting Max and Van Noorden at the Burg-street store, in March last. Max made certain arrangements with witness, which Van Noorden heard and approved. He had tried the "On Guard" mixture, and found it very good.

By Mr. Juta: Van Noorden never said that Max would engage witness as traveller.

By the Court: He understood he was dealing with Max and Van Noorden. The two together engaged him provisionally.

Mr. John Hands gave evidence that in March he was at the Burg-street store, and Max asked Van Noorden if he could give witness credit as usual, and Van Noorden said yes. Max introduced Van Noorden to witness as his partner.

By Mr. Juta: That was the only occasion when he met Van Noorden. It was about March 10.

Mr. Adolph Birkenberg, who created some laughter by refusing to give evidence until he had received his "witness money," and was only pacified when counsel promised that the money

should be paid, deposed that for nine months he worked for Van Noorden at his store in Loop-street. One day Van Noorden brought Max up to the store, and told witness to take instructions from Max with regard to the steaming of tobacco. The steaming was done to take the smell out of the Boer tobacco.

By Mr. Juta: Max only came to steam tobacco once.

Mr. J. G. Newlands, accountant, put in certain accounts framed on the basis of Max's books and upon his personal information, and said that according to those sources there were eight items in which the respective accounts submitted by Max and Van Noorden differed.

Mr. E. H. van Noorden, the defendant, examined by Mr. Juta, gave evidence that he traded as De Jongh, in which capacity he manufactured snuff, for the recipe of which he paid £2,000. He was introduced to Shakofsco (Max) by Cohen. He never agreed to go into partnership with Max. He swore positively that he knew nothing of Max except that he owed witness money. So far from agreeing to take Max into partnership and pay £2,500, he would have required that sum as an inducement to take anyone into partnership. As to the cigarette-making, he simply advanced plaintiff money to carry on the business in order that he might get his own money back again. He never agreed to take over Max's plant, and did not know what plant he had. He only paid Dawes at Max's request, and on the clear understanding that he was to be recouped. Max told him that Meser was employed by White, Muller & Co., and witness then cautioned Max against interfering with other people's servants. The first time witness heard anything about a partnership was when he refused to supply Shakofsco with more tobacco. On that occasion Shakofsco was very violent, and told witness he would drag him into the Insolveney Court. The reason why he refused further supplies was that Shakofsco did not render him any accounts. He had never received proper accounts from Shakofsco. It was not true he ever agreed to pay Shakofsco's debts. He was asked to do so but refused point blank. He was doing a good business in the snuff trade, and never in any way had in view a partnership with Shakofsco. He never told Shakofsco to get labels printed ; as a tobacco manufacturer he had his own label.

By Mr. Searle: His business was in snuff, tobacco, pipes, &c. He could not say if he was

lling much cut tobacco in tins at the beginning of the present year, but he had sold cut tobacco for years, and had machinery for that purpose. He did not think he had large orders for cut tobacco at the commencement of this year. Shakofsco never mentioned the "On Guard" label to him. Shakofsco told him the "On Guard" label was for cigarettes. Meser's evidence, that witness asked him to sell snuff, was a fabrication. Shakofsco never gave witness a new recipe for snuff. He had not been turning out new snuff; that he was selling now was prepared on the same principles as that sold seventy years ago. If he made snuff on any other principle his trade would go. He did not know that Shakofsco had had large experience in cigarette-making with Allen & Ginter, in America. The labour used in making 100 cigars cost about 2s. 6d. per 100, though he could make them for 1s. 9d., exclusive of the cost of tobacco.

Mr. J. R. Lancaster, accountant and agent, deposed that Shakofsco told him he was Max & Co. When Shakofsco was sued in the Resident Magistrate's Court witness was not instructed by Shakofsco to raise the defence that there was any partnership between himself and Van Noorden.

By Mr. Searle: According to Shakofsco's estimate of the number of cigarettes produced from one pound of tobacco, he had supplied Van Noorden with 10,000 cigarettes less than were due to him.

Counsel having addressed the Court,

Judgment was given by the Chief Justice. His lordship said he would have expected that when a partnership of this importance was entered into there would have been some written agreement. The law did not absolutely require a written agreement, but what it did require was that where a mere oral agreement was relied upon to prove the partnership there should be very clear evidence that there was the partnership. The plaintiff set forth that there was a partnership, and the defendant denied it altogether, and stated that there was an agreement which, whatever it might amount to, was certainly not a partnership. He was satisfied, from the whole probabilities of the case, that the defendant never would have entered into any such agreement as was set out in the declaration, the plaintiff being a man of straw. It was said that he possessed some skill, but his skill was not so great that on that account alone defendant would have taken him into partnership. The defendant had a large and old-established business in Cape Town, from which he derived large profits, and the allegation was that the defendant not only allowed the plaintiff to enter that business as a partner, but also agreed to expend £2,500 in the importation of fresh machinery, by which the plaintiff was to benefit. Such a thing was extremely improbable. The plaintiff further relied upon some casual conversations which were said to have taken place with Van Noorden. Those conversations no doubt tended to show that there might have been a partnership, but it was possible the witness misunderstood what took place ; certainly a partnership of that kind would hardly be established by casual conversations between the alleged partners. But to clinch the whole matter they had the evidence of the plaintiff himself,

given in the Resident Magistrate's Court, in a case in which he was sued for certain moulds said to be supplied for the purposes of the partnership. In his evidence he then positively stated that the moulds were ordered for Van Noorden. If the partnership existed at that time it was impossible to believe that such a defence would have been set up. Either the plaintiff was dishonest then or he was dishonest now. The two statements could not be reconciled. If there was a partnership when that case was before the Magistrate, then the plaintiff was dishonest to say that he was not liable at all for the moulds, and that the whole liability rested with Van Noorden. In his opinion the defendant's version of the facts was far more probable. It was that an arrangement was made for a month, the plaintiff to make cigarettes with tobacco supplied by the defendant, who was to retain control of the proceeds. That was intelligible, seeing plaintiff owed money to defendant. There was a claim in reconvention, but he understood it would not be pressed. Judgment would be for the defendant with costs, and absolution from the instance upon the claim in reconvention.

[Plaintiff's Attorney, D. Tennant, jn.; Defendant's Attorneys, Messrs. Fairbridge & Arderne.

SUPREME COURT.

WEDNESDAY, SEPTEMBER 2.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

GILL V. DE VRIES.

Lease—Alleged breach of covenant for quiet enjoyment—Nuisance—Loss of business—Damages—Counterclaim—Tender—Costs.

Mr. Schreiner and Mr. Graham for the plaintiff; Mr. Searle and Mr. Tredgold for the defendant.

This was a case in which the plaintiff, Mr. A. Gill, claimed from the defendant, Mr. B. A. de Vries, the sum of £100 in damages. The action was brought by the plaintiff as lessee of certain premises known as the Mashonaland Café, at the corner of Grave-street and Longmarket-street. The premises were leased by plaintiff, and hired by defendant, by a lease dated February 21, 1891, to take effect from February 1, The ground of action was the alleged existence and continuance on the premises, during the time of occupation, of a nuisance in the shape of a smell, dangerous to health, and absolutely inconsistent with comfort. The premises were leased for use as a café, and also as a residence for plaintiff and his family, but it was alleged that owing to the very bad smell plaintiff suffered greatly in business, and also in his own health and that of his family. When plaintiff was fitting up the place complaints were made that there was a noxious smell, and notice was then given the defendant, but nothing was done. Afterwards repeated notice was given the defendant, and in April and June plaintiff sought the assistance of the town authorities in the matter. In June the Municipality took steps to put the place in order on Mr. De Vries's account. It was then found (counsel stated) that the state of things was something frightful. Beneath the floor of the premises was found a quantity of noxious matter; the ground below was saturated with it, and there was found an old tub which had been used as a kind of cess-pit. The tub was full of very offensive matter. The defects were remedied in part by the town authorities in June, but plaintiff had then sustained very considerable damage.

Defendant, in his plea, stated that plaintiff called his attention to the nuisance in June, when he immediately took steps to remedy it. The smell was mainly due to the presence of certain dead rats beneath the floor and to the escape of gas from pipes put down by plaintiff. There was a claim in reconvention for £45 for rent. An action for the recovery of one month's rent, £22 10s., was commenced in the Magistrate's Court, but adjourned pending the decision in this case.

Mr. Searle said that his client had tendered £22 10s. and costs in the Resident Magistrate's Court in full settlement for any damage plaintiff had sustained.

Mr. Schreiner said that in that case the only point was as to the amount of damages.

Mr. A. Gill, the plaintiff, stated in evidence that he took the premises for three years. He spent about £240 in fitting up the premises. When he first commenced the work of fitting up the carpenters complained of the smell, and he called defendant's attention to it. Mr. De Vries replied that the place had been closed up a long time, and that when it had been opened a short while the smell would disappear. In June, after making repeated complaints to Mr. De Vries, he caused the town authorities to take up the flooring with a view to sanitary improvements being made. When the floor was opened the ground below was discovered to be a mass of sewage, filthy, black, and full of worms, the passage itself being alive with worms. There was a tub under the

wall full of sewage and stones. He had the tub at once emptied, but even then it filled up to a depth of seven or eight inches. His takings in March were £80 9s. 7d.; in April, £112 8s. 8d.; in May, £78 19s.; and in June, £46 10s. 8d. He accounted for the falling off in takings because of the smell. People sometimes got up and walked out of the place without finishing their meals. The members of his family were all taken ill, and he was compelled to send them away to the country, acting on medical advice. He had now taken premises in Grave-street, and his customers were coming back again.

By Mr. Searle: He only complained once to Mr. De Vries in writing, but many times verbally. He had a large gas stove on the premises for cooking, but it was not true that the next-door tenant had complained that the smell arose on account of the gas stove. In June he refused to pay the rent, and decided to leave the premises. It was wholly untrue that the smell arose from the stove. He had spoken of a gassy smell, but by that meant sewer gas. It was untrue that he poisoned rats in the shop. He set rat traps for them, and caught them, but had never poisoned a single rat, nor were any dead rats found under the flooring when it was taken up. He admitted his family slept in partitioned rooms near the gas stove, but denied that their illness was traceable to that. The smell was most severe when there was a north-west wind blowing. The stench at such times was intolerable. His bookkeeping was somewhat rough, but it was not true that the whole speculation had resulted in a loss. He gave up the hope of making money when he saw the abominable state in which the place was, and set about leaving the premises as fast as he could.

By Mr. Schreiner: But for the smell he would have been making a profit of £30 per month.

Mr. R. Mitchell, Chief Sanitary Officer of the city, was called, and said that on behalf of the Town Council he was instructed to take the ruling of the Court as to whether the books of the Sanitary Department, which was supposed to be a secret department, should be produced.

The Chief Justice said they must be produced in so far as they threw light on this case.

Mr. Schreiner said there were many things done in secret, but he did not think the Sanitary Department was a secret one.

Mr. Mitchell then proceeded to give evidence. He said that in April, 1890, a letter was sent by Dr. Fisk to Mr. De Vries, calling attention to the unsanitary condition of the premises in question. That was before witness came, but the letter appeared in the letter-book. In April of this year, witness sent a further complaint to defendant. At that time the smell was believed to arise because of the gas meter. In June last the defendant was again communicated with, and eventually the floor was taken up and a cess-tub discovered which had evidently been there from the time when the place was built. The foundation had been built over the tub, which was full of sewage.

By Mr. Searle: It was possible that the builder himself did not know the tub was there, but the foundation had clearly been built over the tub.

Major Vibart, R.A., stated that he had frequented the café as a customer. He had very often observed a most offensive smell there. In his opinion the smell was not due to gas but sewage.

By Mr. Searle: He visited the café most frequently in June. The smell was worse in June than in May. The reason why he continued to go there was that the cooking was so excellent that he even put up with the smell. He, however, always went upstairs, where the smell was least noticeable.

Dr. Baird gave evidence that he had attended a child of Mr. Gill. It was suffering from feverishness, headache, and general ill-health. He saw the child several times in June. He himself had not observed any bad smell, but he called about lunch time when the odour of food was prevalent. He attributed the child's illness to the generally unsanitary state of the place. He saw the soil taken from beneath the flooring, and also the tub, which was full of foul matter.

By Mr. Searle: He was not there till June. The child slept in a partitioned room, through the grill-room. The fumes from the gas stove, in the absence of ventilation, would be injurious to health. The child suffered from a sort of blood-poisoning. He was quite satisfied of the cause of the illness. It was in consequence of witness's urging that Gill approached the Municipal authorities.

James Ballard, sanitary inspector, said he went with the Municipal Clerk of Works about June 11 to inspect the café. When the flooring was taken up the ground was soaked with sewage which had leaked from the pipes, the latter never having been properly jointed.

Mr. M. Fysh, plumber, said that he saw the tub emptied, but when he came back, two hours later, he found that six and a half inches of offensive liquid matter had oozed into it again out of the ground. He pushed a bar down below the ground, and it came up covered with foul matter. The smell did not arise from the coal-gas, nor from the presence of dead rats, but from sewage.

By Mr. Searle: The tub was built entirely in the centre of the wall, the footings of which were actually in the tub. The size of the tub was three feet by two feet nine inches, and across the top of it was laid a piece of stone, forming part of the foundation.

Mr. John Foster, plumber, corroborated the evidence of the previous witness.

Mr. Burland, assistant with Mr. J. Garlick, said that in February last he was laying linoleum at the café He went there each morning for about a week, and then noticed a bad smell.

By Mr. Searle: At that time the stove had not been fixed.

Mr. T. H. Peagrim, bookkeeper with Mr. Muller, whose premises adjoin the café, said there was a party wall between the two places. The smell coming from near the wall was so bad that he had to leave the office. He took his meals at the café, but left because of the vile odours.

By Mr. Searle: He ceased attending the café in June. When he saw the tub he concluded he had had enough food there, but now that Mr. Gill had taken fresh premises he had gone back again. The tub was found about four feet from the Grave-street side of the premises.

Mr. J. M. Schwabe, salesman with Messrs. Findlay & Co., said he saw the tub when the café was built, in 1880. He said at the time that it was a shame that the foundation should be built over a tub containing sewage. The tub was discovered after a fire which burnt down the building. At times the smell from the property penetrated so far as Messrs Findlay's shop, and it was found necessary to close the door to keep out the odour.

By Mr. Searle: He was not aware that all the drains in the vicinity of the café were in a bad state. There was one of the sinks known as "stink-traps" at the very door of the café. The trap, however, did not account for the smell complained of in the present action.

By Mr. Schreiner: Since the alterations had been made the smell did not appear so bad.

Mrs. Gill, wife of the plaintiff, deposed that she was ill every morning on account of the smell. She was prepared to swear that customers had gone out because of the smell.

By Mr. Searle: After the first month the business was increasing, but it fell off very rapidly as the smell grew stronger.

Mr. W. Cooke deposed that he previously occupied the premises now known as the Mashonaland Café, and was in occupation about six months. The sanitary condition of the place was very bad indeed, and the proprietor, Mr. De Vries, took no notice until he was compelled to do so by the Municipal authorities. Something was done, but it did not touch the seat of the complaint.

Cross-examined: Mr. Wentzel was employed by Mr. De Vries to look into the matter. He had a quarrel with Mr. De Vries about twelve months ago, when he was fined 2s. 6d. for a technical assault. He never told either Wentzel or Robertson that he was satisfied.

Mr. Schreiner having put in certain correspondence, and having addressed the Court,

The Chief Justice said that, in this case, the Court must assume that the defendant was aware of the defect, and further that the defects were of a serious character. It was necessary that there should be clear proof of damages. No doubt there had been a falling off in the business, but there was no proof whatever that the falling off was in consequence of the stench; in fact, one of the witnesses for the plaintiff said that, in spite of the odour, he liked the cooking so much that he continued to visit the café. There should have been evidence adduced that people ceased to frequent the place because of the stench. If there had been no tender of £22 10s., he would have been at a loss to discover what amount of damages to assess, but as that amount had been tendered, judgment would be for that sum. The only question now was as to costs, and on that point he would like to hear Mr. Searle.

Mr. Searle having argued the point, followed by Mr. Schreiner on the other side,

The Chief Justice said that judgment would be for plaintiff for the amount of the tender, £22 10s. with the Resident Magistrate's Court costs to 21st August, but without costs subsequent to the filling of the plea. On the claim in reconvention judgment would be for De Vries, for £45 and costs.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

In re F. C. BELL.

Goods *in transitu*—Attachment *ad fundandam jurisdictionem*.

Mr. Schreiner moved that an attachment be made of certain goods belonging to Mr. F. C. Bell, of Johannesburg, under the following circumstances: It was alleged that the respondent was indebted to the Van der Stell Gold-mining Company, whose head office was at Stellenbosch, in the sum of £6,500, being the purchase price of the property and plant, and that his wife, Mrs. Maud C. Bell, was proceeding to England that afternoon on the U.R.M.S. Scot, having in her possession certain valuable property belonging to her husband, which it was desirable should be attached *ad fundandam jurisdictionem*.

Mr. Searle, who represented Mrs. Bell, read her affidavit, from which it appeared that she was married in London in 1886 under a settlement. About the 20th ult. she left Natal in the Scot, accompanied by her child, her husband remaining behind. The articles in her possession were her own property, beyond one or two practically valueless articles belonging to her husband, who had a good defence to any action brought against him.

Mr. Schreiner said the luggage had been examined, and a list made of the articles found therein. There was no objection to Mrs. Bell taking away her property; but he claimed that of her husband.

Mr. Justice Buchanan said he had been led to believe in Chambers that there was a great deal of property, but he now saw that the Deputy Sheriff valued the lot at about £10.

Mr. Schreiner said he had nothing before him except the petition.

Mr. Searle remarked that his learned friend had found a mare's nest, and had only discovered some shirts, a couple of suits of clothes, and a revolver, which it was now asked to attach as security for the sum of £6,500. He believed there were also a few bottles of wine. Further, he remarked, the contract was made in the South African Republic, and not in this colony.

The Chief Justice said that as the applicants only required something to found jurisdiction, one shirt would be sufficient.

Mr. Searle rejoined that the applicants evidently thought that they were coming upon a secret store of wealth, and he did not think that such proceedings should be encouraged. He did not think there should be any order as to costs against Mrs. Bell.

The Chief Justice said that the order would be for the attachment of the goods belonging to Mr. Bell *ad fundandam jurisdictionem*, and there would be no order as to costs against Mrs. Bell. Leave would be given to sue by edictal citation, returnable on the first day of next term, publication in the *Star* failing personal service; costs to be costs in the cause.

KINCAID V. NIXON'S EXECUTORS.

Transfer—Action for—Power of Attorney to pass transfer—Signature obtained through alleged fraud and misrepresentation—Trespass—Counterclaim.

Mr. Juta and Mr. McLachlan appeared for the plaintiff, and Mr. Schreiner for the defendants.

This was an action for transfer, or in the alternative for £100 damages, instituted by Mr. F. A. Kincaid, against Ellen Johanna Nixon and John Nixon, in their capacity as executors dative of the late Joseph Nixon.

The declaration alleged that on or about the 28th February, 1891, the plaintiff bought from the defendants through their duly authorised agents, Messrs. H. Jones & Co., auctioneers, certain two lots of ground of the divided estate Claremont, for the price of £16. That thereafter the plaintiff paid the charges of the auctioneer, and paid the purchase price to Messrs. C. and J. Buissinne, attorneys, of Cape Town, and acting as such for and on behalf of the defendants. That a declaration of purchaser was drawn by the said attorneys and signed by the plaintiff, but that the defendants refused to pass transfer to the plaintiff. Wherefore the plaintiff claimed that the defendants should be ordered to pass transfer of the two lots in question, or in the alternative to pay the sum of £100 damages and costs.

The defendants in their plea admitted their refusal to pass transfer of the lots in question, but specially denied that Messrs. H. Jones & Co., auctioneers, or Messrs. C. & J. Buissinne were their agents or attorneys respectively in the matter as alleged in the declaration, or that they had any authority to sell the ground in dispute. They also specially pleaded that one Wordon, who was interested in the plots, without authority procured the same to be sold. Further, that on the 18th March Wordon falsely and fraudulently represented to the first-named defendant that a certain document, which was really a power of attorney to pass transfer, was a document to enable her to obtain certain moneys in the hands of Messrs. C. & J. Buissinne, and by means of fraud obtained her signature to the same, and that as soon as she knew the purport of the said document she repudiated the same. The defendants counter-claimed for £5 damages alleged to have been sustained by reason of the trespass by the plaintiff on the aforesaid lots.

Upon these facts and pleadings issue was joined.

Mr. G. Trollip, attorney-at-law, deposed that in 1887 he was acting as attorney for the late Mr. Nixon. At his decease the Board of Executors came to him and demanded certain papers, which he gave up. In January or February last Mr. Wordon, who had a joint interest in the land in question, called upon him about the land, and he referred him to the Board of Executors. He subsequently saw Mr. Roos, secretary of the Board of Executors, on the subject, and he stated that the estate was closed, but if he (witness) liked to sell the ground he could do so, provided that the Board was put to no expense and received half the proceeds. The sale was effected, Mr. Henry Jones conducting the sale. No repudiation was lodged by the Board of Executors. He gave a power of attorney to Wordon for the executrix to sign, and he returned the document with a signature purporting to be that of Mrs. Nixon. She called upon him and asked for the purchase amount of the property, and he told her she could get it as soon as all the formalities had been fulfilled. Mrs. Nixon never told him that she had been induced by fraud or misrepresentation to sign the power of attorney.

Cross-examined: He supposed that Mr. Roos must have known that the property had been sold

to Mr. Yeoman. His instructions from the Board of Executors were to collect the money and pass transfer. In his experience in dealing with Boards in this city he always found that their word was as good as their bond, consequently he did not require written instructions.

Mr. A. H. Macleod corroborated the evidence of the previous witness.

Mr. S. Wordon deposed that he went to see Mr. Roos concerning the two lots of ground, and he informed him that the Board was willing that the land should be sold, but would not hold themselves responsible for any expense. Witness imagined that he would receive half of the proceeds of the sale. He left the affair entirely in the hands of Mr. Trollip. After the sale took place he took a power of attorney to Mrs. Nixon to sign, in order that transfer might be passed. He did not misrepresent the condition of affairs to her.

Cross-examined: The ground was already sold when he visited Mrs. Nixon.

Mr Henry Jones deposed that he received authority from Mr. Trollip to hold the sale in question.

Mr. J. T. Roodt deposed that he knew the two plots of ground at Claremont, and had offered £80 per plot to Kincaid, the purchaser.

(3rd SEPTEMBER.)

The hearing of this case was resumed; Mr. Juta and Mr. McLachlan for the plaintiff; Mr. Schreiner for the defendant.

Mr. J. H. N. Roos, secretary of the Board of Executors, gave evidence that Mr. Wordon called several times on him to ask for a re-sale of the lots, but he told him that was impossible without consent of the parties concerned. He met Mr. Trollip on one occasion, when that gentleman said that Wordon was getting troublesome, and that perhaps the land had better be sold. Witness replied that the Board would take no such responsibility. Mr. Trollip was mistaken in saying that witness consented to the sale on the condition that no expense was incurred. As secretary of the Board, he never in any case authorised a sale before the Board's consent being obtained. If he had given authority, as was stated by Mr. Trollip, it would be the first time he had ever acted in that way. He was unaware of the sale until a couple of days after it had actually taken place. When he heard of the sale, he immediately concluded that the executors had authorised it. When Mr. McLeod called with papers regarding the declaration of sale, witness distinctly refused to accept any responsibility whatever in the matter. On April 2 he received a letter on the subject, which he at once showed to the chairman of the Board.

By Mr. Juta: He distinctly said that he knew nothing of the sale until after it was effected. He had heard Mr. McLeod's evidence. It was possible that, when Mr. McLeod said he had seen him several times on the matter, Mr. McLeod was mistaken. At all events, he did not recollect seeing Mr. McLeod more than once on the subject.

Mr. J. H. Hofmeyr, chairman of the Board of Executors, deposed that in no case would the sale have been authorised without the consent of the Board. In the present case not only was no consent given, but the Board opposed the sale in every way, and he instructed Mr. Roos to have nothing to do with it. He had always refused to allow the sale because he was aware that the land was already sold.

By Mr. Juta: There was no direct obligation upon the Board to collect the money due from the original purchaser of the land or his surety.

By the Court: He was firmly convinced that Mr. Roos never in any way sanctioned the sale.

Mr. G. W. Dillman, clerk with the Board of Executors, stated that on several occasions Mr. Wordon came to see Mr. Roos, in whose room witness was engaged. Mr. Roos on all occasions absolutely refused to permit the sale, informing Wordon that the land was legally and formally sold already.

By Mr. Juta: He never heard Roos remark that he did not object to the sale going through if the Board were not fixed with the expense.

Mrs. Ellen Nixon, one of the defendants, said she was executrix in her husband's estate. She knew nothing of business, and left affairs in the hands of the Board of Executors. In March, Wordon, whom she did not recognise as having any claim on her husband's estate, came to her and said that if he were not looking after her business she would lose her money. He said there was some money for her at Mr. Trollip's office. She asked what the money was for, but Wordon did not tell her. He asked her to sign a paper then and there, but she asked him to leave it, telling him she could not understand it. Wordon pressed her to sign it, and she at last did so, but only under the impression that she was signing a receipt for the money Wordon had spoken of. Some days later she went to Mr. Trollip's office, and asked for the money, but was told there was no money for her.

By Mr. Juta: She knew nothing of the original sale of the land to Yeoman. Had she known that Wordon wanted her signature for the purpose of allowing the sale of the land she would absolutely have refused to give it. She would have authorised no sale without consulting her attorney.

Mr. C. C. de Villiers, attorney gave evidence that in his presence Mrs. Nixon denied to a clerk of Mr. Trollip that she had signed a power of attorney authorising the sale of the land.

The Chief Justice, in giving judgment, said that in order to enable the plaintiff to succeed the burden lay upon him of clearly proving consent to the sale on the part of the executors, or the general agents of the executors. There was a great conflict of testimony as to what took place in the communications between Mr. Trollip and Mr. Roos. He was quite satisfied that Mr. Trollip did understand that there was a consent given; but he was also satisfied that Mr. Roos did not so understand it. Under the circumstances, he was of opinion that there must be an absolution from the instance with costs.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorney, H. P. du Preez; Defendants' Attorney, C. C. de Villiers.]

SUPREME COURT.

THURSDAY, SEPTEMBER 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS) and Mr. Justice BUCHANAN.]

Company—Bank in liquidation—Unlimited liability—Contributories—Calls—Deceased shareholder — Executors — Negligence — Liability of heirs—Ordinance No. 104—Section 32.

WATSON'S EXECUTORS V. WATSON'S HEIRS.

Sir T. Upington, Q.C., and Mr. Juta appeared for the plaintiffs, Mr. T. L. Graham for Mr. H. T. Watson, and the Acting Attorney-General (Mr. Searle) and Mr. Melteno for the defendants.

This was a case arising out of the liquidation of the Union Bank. An order was made by the Supreme Court to place the executors on the list of contributories. A question arose as to the payment out to the heirs, from time to time, of the amount of the inheritance which became due to them as heirs, and the matter stood over to enable the present action to be brought, on the part of the executors, to recover back into the estate for the purposes of the liquidation of the Union Bank the amount of the inheritance paid to certain of the heirs. The defendants were four in number—Harrison Fraser Watson, Thomas Tennant Watson, Mrs. Bolus, and Miss Watson. The remaining six heirs were either out of the jurisdiction of the Court or it was not possible to have the question decided with regard to them. The point at issue was as to whether the money could be got back or not. The defendant H. F. Watson submitted to the jurisdiction of the Court. The facts appear more fully from the declaration, which is as follow:

1. The plaintiff is one of the duly-appointed executors of the late Thomas Watson The defendant Harrison Fraser Watson is the other executor in the said estate. (By order of the Supreme Court, dated 23rd June, 1891, the plaintiff was granted leave to sue alone.) The defendants are some of the children of, and heirs under the will of, the late Thomas Watson.

2. The said Thomas Watson was at his death, to wit, in the month of February, 1884, the registered holder of 100 shares in a certain joint-stock bank, with unlimited liability, known as the Union Bank, carrying on business in Cape Town.

3 In March, 1884, the executors in the said estate publicly advertised that all claims against the said estate should be filed with them within six weeks, and thereafter they framed and filed up to and including the year 1885 six liquidation accounts. No claim was filed by the said bank.

4. In April, 1886, the said Union Bank made a call of £5 upon each share in the said bank, payable in instalments. The sums of £400 and £100 paid by the said executors in terms of the said call were brought up in the sixth and seventh liquidation accounts framed and filed by them in the said estate. Copies of the said accounts were either sent by the said executors to each of the defendants, or were examined by them personally, who also received and accepted the amounts awarded to them upon footing of the said accounts.

5. In the month of January, in the years 1889 and 1890, the said bank paid a dividend to shareholders therein of 10s. per share, which dividends, amounting to £100, were brought up in the ninth and tenth liquidation accounts framed and filed by the executors in the said estate. Copies of these said accounts were either sent by the said executors to each of the defendants, or were examined by them personally, who also received and accepted the amounts awarded to them on footing of the said accounts.

6. In the month of March, 1890, the said executors sold fifty of the said shares, the residue remaining as heretofore in the name of the late T. Watson with the knowledge and consent of the defendants.

7. On the 1st August, 1890, the said bank was by order of the Hon. the Supreme Court placed under the operations of the Winding-up Act, the estate of the late T. Watson was placed upon the list of contributories in respect of the said fifty shares, and on the 8th and 12th September, 1890, *calls* to the amount of £150 per share was authorised by order of the Court.

8. The funds available in the hands of the executors for the payment of the said call, amount-

ing in all to £7,500, was the sum of £425 17s., and there are no further assets belonging to the said estate wherewith to pay the balance which remains due on the said call.

9. Under the ten liquidation accounts aforesaid there was paid to and received by each of the defendants, as heirs of the late T. Watson, the sum of £4,813 2s. The said amounts were paid and received without any knowledge or contemplation of the facts that the bank would be placed in liquidation and that a call would be made on the shares held in the said bank, but, on the contrary, were so paid and received under belief of the fact that no call would be made. The said bank has not yet been finally liquidated, and the said calls will not be sufficient to pay the liabilities of the said bank. The plaintiff submits that the defendants are not entitled to retain any of the amounts so paid and received as aforesaid while the bank remains under liquidation, but the defendants, though requested so to do, refuse to pay to the plaintiff for the purpose of meeting the calls already made, and which may hereafter be made, the amounts so paid and received as aforesaid, or any part thereof.

Wherefore the plaintiff prays:

(*a*) That each of the defendants may be ordered to repay to the plaintiff the sum of £4,813 2s., with interest *a tempore moræ*.

(*b*) For such other relief as to this Honourable Court may seem meet.

(*c*) Costs of suit.

The defendants pleaded, *inter alia*, that it was the duty of the executors promptly and timeously to have sold the said shares within the period of six months, or at the most one year after they were so appointed, and not to have suffered them to remain in the estate.

That the defendants refused to take over any of the said shares in the said estate when requested by the executors so to do, and repeatedly requested the executors to dispose of the said shares as they could and should have done in that behalf.

That the said executors wrongfully, unlawfully, negligently, and in breach of their duty detained the said shares in the estate, and failed to realise them, and are consequently responsible for any loss or damage which may accrue by reason of the said shares being still registered in the name of the late Thomas Watson.

They denied that the fifty shares sold in March, 1890, had been sold with their knowledge and consent, and said that it was the duty of the executors at that date, or at the earliest date possible thereafter during 1890, to have disposed of the remainder before the stoppage of the said bank, seeing that they had previously neglected their duty in that behalf.

They admitted that the liquidation accounts (referred to in the declaration) had been filed, and that each of the heirs had received £4,813 2s., but they alleged that these amounts were received from the executors as being moneys accruing from their father's estate, and to which they were absolutely entitled without subsequent liability in respect thereof, and by reason of the allegations above set forth and the provisions of *Ordinance 104*, and more particulary section *32 thereof*, and the laws of this colony in that behalf, the defendants said that they were not liable to return the said moneys at the suit of the plaintiff.

Finally, the defendants denied knowledge as to the sufficiency or otherwise of the calls made by the liquidators of the said bank, but they said that if any loss had been sustained by reason of any liability to the said liquidators in respect of the shares still in the name of the late Thomas Watson, such loss ought to be borne by the executors for the reasons herein set forth, and not by the defendants.

Wherefore they prayed that plaintiff's claim should be dismissed with costs.

Upon these pleadings issue was joined.

Sir T. Upington remarked that it was somewhat difficult to see how that defence could be dealt with; there was no claim in reconvention, but it was simply asserted that the executors improperly retained possession of the shares.

Mr. Graham said he desired to explain the position of Mr. Harrison F. Watson, who, besides being an heir, was co-executor under his father's will. When the present case was commenced, Mr. Watson at once submitted to the jurisdiction of the Court.

Mr. W. A. Currey, secretary of the General Estate and Orphan Chamber, one of the plaintiffs, deposed that in 1884 tenders were called for the shares, but the only offer received was one of 10s. for ten shares. The executors accepted the tender, but the bank declined to transfer the shares. Then the executors advertised the remaining ninety shares, but no offer was made. The executors paid £500 in calls on account of the shares. In 1886 the shares were perfectly unsaleable. In 1889 the executors approached Messrs. Edwards & Arnold and asked them to buy the shares, but no offer was made. In February, 1890, fresh tenders were called for, but none received. Then there was an attempt made to sell the shares on the stoep of the Commercial Exchange, and fifty were sold and brought into the next account submitted to the heirs. The executors never apprehended at that time that there would be further calls on account of shares.

By Mr. Searle: He was aware that some bank shares were sold in 1888. He did not remember selling a parcel of three shares in that year for 54s. apiece. He was aware that as the result of a flourishing report issued in 1888 Union Bank shares went up to £4. He was aware that in 1888

Mr. John Ross (chairman of the Union Bank) purchased a parcel of 614 Union Bank shares in the estate of Du Toit. The fifty shares were sold for 25s. apiece. It was true that in 1884 he said the executors would sell the bank shares as soon as they could, and they tried to do so. The shares were at the highest value at the commencement of 1889, but his information on the subject was hearsay. He was told that the shares were selling up to £4 apiece. He did not consult the share lists at the end of 1888, or the beginning of 1889, as to the prices at which Union Bank shares were selling. He had no recollection of a conversation with Mr. T. T. Watson in the course of which that gentleman distinctly told him that it was his idea that the heirs could refuse to take the shares. So far as he remembered, not one of the heirs ever asked that the Union Bank shares should be sold. He accounted for the fact that he sold 125 Union Bank shares in the estate of Mr. Kotzé by the circumstance that in that case the heirs specifically asked that the estate should be closed and the shares sold.

Re-examined: He was never specifically asked by the heirs to sell the Union Bank shares.

This closed the plaintiff's case.

The Chief Justice said he did not understand how the plea of the defendants could be sustained in that form of action.

Mr. Searle said he had proceeded in the way indicated by the Court when the circumstances of the case were recently under consideration.

The Chief Justice said the Court indicated no such line of action.

Mr. Searle said in that case it seemed that all the circumstances would have to be gone into over again, which seemed a pity, seeing the expense that would be incurred.

The Chief Justice: It is not the fault of the Court. It is a pity your plea was not excepted to.

Mr. Searle said that after what had fallen from the Court he failed to understand the plaintiff's replication at all.

Counsel then called

Mr. Thomas Tennant Watson, Government land surveyor, one of the defendants. Witness said he remembered on one occasion distinctly telling Mr. Currey to sell the shares. He caused his attorney to write to Mr. Currey, informing him he would hold the executors responsible for unduly retaining the shares. Mr. Currey replied denying liability.

By Sir T. Upington: When he instructed Mr. Currey to sell the shares, he said it was a great nuisance, and that he wished to get rid of the shares. He believed that after that time he received dividends on account of the shares.

Re-examined: He never told the executors that he relieved them of liability on account of the shares.

By the Court: He could not say whether it was before or after the failure of the bank that he knew what dividends had been paid, but he no doubt did know that dividends were paid on shares in the estate.

Mr. Henry Hall, formerly cashier of the Union Bank and now in the employ of the liquidators, gave evidence that he had prepared from the books of the bank a statement put before the Court with regard to these shares. In 1888, 1889, and 1890 Union Bank shares were freely dealt in. In 1890 1,200 shares were sold.

By Sir T. Upington: He did not know what prices were being got for the shares.

By the Court: There was a general direction in 1884, when the bank was not so financially sound, not to transfer shares from people financially good to those not so. Watson's estate was considered financially good. It was decided in 1886, when the £5 call was made, that in future great care would have to be taken in allowing transfer, and that direction remained in force till the bank stopped payment. The fifty shares which were sold were transferred to Robert Lloyd, of Fort Beaufort, into whose circumstances inquiry was made before transfer was allowed.

Mr. G. H. Moller, auctioneer, and a late director of the Union Bank, said that in 1888 he sold about 800 Union Bank shares, 600 of which were purchased by Mr. John Ross. In September, 1888, he could have sold his own shares for a higher price than 36s. On the day when Mr. Ross bought 600 he could have sold 200 more. In June, 1889, he bought four shares, at 40s. apiece, at public auction. They belonged to Mrs. Currey. In March, 1890, he bought 30 shares, at 10s. each, and sold them subsequently for 35s. each. In 1888 the Union Bank shares were in very fair demand. There were no special restrictions as to the re-leasing of estates in 1888, but of course the directors would not authorise transfers to men of straw. There would have been no difficulty in 1888 in transferring the shares in the estate of Watson. In that year many influential people were buying Union Bank shares, and transfers took place freely. In 1887 he sold Union shares at 10s. each. There was a favourable report issued in 1888, and the Bank was all right till June 30, 1890.

Mr. George Twycross, member of the firm of Twycross & Co., brokers, Cape Town, said he did a large business in share broking, and had done so since 1881. In 1888 and 1889 Union Bank shares were in fair demand. If he had had fifty Union Bank shares in 1888 he could have sold them to people to whom the bank would have had no objection. In that year he bought fifty shares on account of himself and Mr. Roux for 26s. each. In 1886, when the call was made, the shares would not sell, but in 1888 they sold fairly. In June, 1888, he sold forty-four Unions at 45s., and resold

them at 50s. During the same month he sold twenty more at 42s. 6d. He knew of transactions in 1889.

By Sir T. Upington: He sold none in 1889 or 1890; but none were ever offered to him for sale.

Mr. Henry Jones, auctioneer, stated that in 1888, 1889, and 1890 he sold Union Bank shares. In the two former years the shares sold readily, at a price. The prices he obtained in 1889 ranged from 42s. to 92s. He put up some shares at Mr. Currey's request, but the only bid was one of 5s. each, which Mr. Currey would not accept.

By Sir T. Upington: If Mr. Currey said that the bid of 5s. was only for twenty shares he would not contradict the statement. He could not actually state that the shares offered on that occasion were the fifty shares now in suit.

(SEPTEMBER 4th.)

The hearing of this case was resumed. Sir T. Upington, Q.C., and Mr. Juta appeared for the plaintiffs; Mr. T. L. Graham for the defendant H. F. Watson; and the Acting Attorney-General (Mr. M. Searle) and Mr. Molteno, for the other defendants. Counsel proceeded to address the Court.

Sir T. Upington contended that the evidence laid before the Court by his learned friends was not relevant to the issue raised in the case.

Mr. Searle said it was quite true that the defendants did consider that negligence entered into the case, but he was quite prepared to argue the legal question of whether executors could recover back the money paid to the heirs. When the circumstances of the case were before the Court on motion the Chief Justice asked the question whether executors should not lay aside enough money to meet possible calls on shares in an unlimited liability company.

The Chief Justice: That was upon the question of whether the executors were liable *de bonis propriis*. In the present case the circumstances were different.

Mr. Searle: The point was whether the executors were not the proper persons to sue. The defendants had been clearly misled by the form in which the plaintiffs had brought their action. The plaintiffs had been accused of negligence in disposing of the shares, and they had actually replied that they used every endeavour to sell them. Upon those pleadings issue was joined, and he could not understand his learned friend's remark that the evidence and plea were irrelevant.

Mr. Justice Buchanan: Independently of negligence, do you admit that the executors are entitled to recover from the heirs the money paid on the shares in the estate?

Mr. Searle said he would argue most strongly that according to statutes and the Roman-Dutch law they were not entitled so to recover. The question of negligence was of the utmost importance in the case, seeing that Mr. T. T. Watson had distinctly sworn that on one occasion in particular, in the year 1888, he specifically told Mr. Currey to realise the shares, and that Mr. Currey had said that he would not absolutely deny it. Clearly the duty of the executors was to get rid of dangerous assets as soon as possible, whether the heirs specifically told them to do so or not. His legal view of the case was that it had to be dealt with as though these defendants were legatees. Supposing the late Mr. Watson had left £10,000 for the building of a hospital, and had also left 100 Union Bank shares, which the executors had not, although they could have, sold, and supposing that the £10,000 were paid over, and the hospital built, the executors would not afterwards be heard to say that they claimed from the hospital trustees an amount equal to the call on the 100 unsold shares. It might be said that was an extreme case, but substantially the same principle was involved in the present action. The executors had distributed the estate, and the heirs had altered their whole position in life when they received the money, and it would be an extraordinary thing to hold that the executors could now re-open the matter and recover back money which perhaps had been spent long since. The executors had not acted without knowledge; they had clear notice of the claims, and if they disregarded the notice they did so at their own risk.

The Chief Justice: The executors did not know there was going to be a claim. They knew there was a contingent liability, that was all.

Mr. Searle: The point was, should not the executors have considered the asset a dangerous one, especially when a call of £5 was made upon these shares? The executors could not say there was no likelihood of the bank going into liquidation, because even in 1886 it was in dire straits. The executors said it was the duty of the heirs to have specifically ordered a sale of the shares, but he asked what the executors were there for? They were there as business men in whom the testator had confidence, and they should have acted on their own knowledge of facts. The heirs did not know the exact position of the estate, and the unadministered assets never appeared in the accounts. It was not a matter of the executors being ignorant; the law fixed them with knowledge. If Mr. Tom Watson were believed when he said that on one occasion he distinctly told Mr. Currey to sell the shares, then the fact that Mr. Watson afterwards accepted dividends on the shares and accounts in the estate did not in the least relieve the executors of their liability for the retention of the shares. Mr. Currey had sold four Union Bank shares on account of Mrs. Currey, and 125 in Kotzé's estate, in which he was only

executor two years, and in addition nearly 4,000 of the shares were transferred in 1888, 1889, and the first part of 1890, yet Mr. Currey had not sold the fifty shares in this estate, and to that extent he contended he had failed in his duty as executor. The heirs had taken up a very strong position; one of them said that he would on no account accept the bank shares, and another offered to accept Cape of Good Hope Bank shares but not the Union Bank shares, and that circumstance was very relevant on the point of notice to the executors. He submitted that the Union Bank could have interdicted the executors from parting with the money, and if that were so the plaintiffs could not now succeed.

Mr. Justice Buchanan: In what way could the bank have interdicted the executors. There was no debt, but only a contingent liability.

Mr. Searle: Contingent debts can be proved in an insolvency, and the bank could have come forward and said that as it might have need of the money hereafter the executors should be debarred from parting with it to the heirs before a sufficient sum was laid aside to meet possible calls on the shares. He did not in the least impeach Mr. Currey's *bona fides*, but he did say that he was charged with the duty of selling the shares.

Sir T. Upington, in answer to the Chief Justice, said that there were ten heirs, one of whom was dead, and he took it that the estate of that one was distributed among the other heirs.

Mr. Searle: At the utmost all that each heir was responsible for was £750, the call on five shares. The heirs were dealt with separately, not as a body.

Sir T. Upington: My contention was that the plaintiffs could claim in excess of the £750 from each heir, but not from any one heir, a sum in excess of the amount actually received by him.

The Chief Justice: All the heirs should have been sued, including the executor of the deceased heir.

Sir T. Upington said that was correct, but one heir was in the Transvaal, and all the others, with the exception of the present defendants, in England. The executors had therefore been forced to sue the heirs who were within the jurisdiction of the Court.

The Chief Justice, in giving judgment, said that at the time when the late Mr. Thos. Watson died there were Union Bank shares in his estate. After his death fifty of those shares were sold, and at the time that the bank was placed under the operation of the Winding-up Act there still remained fifty shares in the estate. There had been a great deal of argument upon the question of whether or not there was negligence on the part of the executors in not selling all the shares. In his opinion that question did not fairly arise in the present case, which was an action brought by the executors *qua* executors against the heirs who had received their inheritance, and if this debt were now due, as they must take it it was due, from the executors in their capacity as such, then in his opinion the executors, having paid over the money to the heirs, were entitled to recover it back. As to the money being due, there could be no doubt whatever, because there was actually a judgment debt against the executors. There had been virtually a return of *nulla bona*, and subsequently to that return an application was made to the Court by the liquidators of the bank to recover the amount of the call from the executors *de bonis propriis*. The Court, considering the hardship which such a course might entail upon the executors, decided that before making such an order it would give an opportunity to the executors of recovering back from the heirs the money paid out to them, but in coming to that decision the Court did not express any opinion to the effect that any negligence on the part of the executors in not selling the shares at the proper time would be a good defence to the action brought against the heirs by the executors. The question having been raised, however, he was of opinion that it was no defence at all. If the heirs had any claim against the executors individually it was still open to them to bring an action, but in the present case there was not even a claim in reconvention which would justify the Court in giving judgment against the executors, nor did he see how such a claim could have been filed, seeing that the action was not brought by the General Estate and Orphan Chamber in their individual capacity but as the executors in the estate of Watson. Reference had been made to Ordinance No. 104 of 1833, section 32, but the Court had more than once intimated that the persons there referred to as having just and valid claims were not legatees or heirs but creditors, and the rights of heirs and legatees and their obligations had still to be decided by the common law. Now, under the common law, in his opinion, executors against whom there was a judgment, as there was in this case, for a debt owing by the deceased, and who had paid out inheritances to the heirs in ignorance of that claim, were entitled to recover back the money from the heirs. That being so, the executors were, in his opinion, entitled to recover back from the heirs in Watson's estate the amount of inheritance which had been paid to them, the amount of the call for which judgment was given not exceeding, however, the amount of inheritance paid to the heirs. A further question of importance in the case was as to whether the judgment should be against the present defendants jointly and severally, and that the Court would like to take time to consider. The form of the judgment would be reserved, but perhaps before

final judgment was given the parties would come to an arrangement.

Mr. Justice Buchanan concurred, and said he wished expressly to state that the question of the liability of the executors *de bonis propriis* was in no way affected by that case.

The Chief Justice said that as to costs they would follow the result. He threw out a suggestion during the course of the argument that possibly the plea might have been excepted to, but as the plea was so mixed up with the rest of the defence, it would have been difficult to have excepted to it.

Mr. Graham asked the Court to make a special order as to costs in the case of his client, Mr. H. F. Watson, since he had not denied the allegations in the declaration, and had submitted to the jurisdiction of the Court.

The Chief Justice said the Court would consider how to apportion the costs when giving final judgment.

At a later stage of the sitting,

The Chief Justice said the Court had considered the question as to whether the defendants were liable jointly and severally, and had come to the conclusion that each defendant was liable only for £750. If the creditor would not have the right to recover more than a portion from each of the heirs, *à fortiori* the executors would not have the right. The sum of £750 would be payable by each of the ten heirs, but £425 17s had already been paid; therefore judgment would be against each of the defendants for £707 9s. 0d. As to costs, he did not see why the first-named defendant, Harrison Fraser Watson, should be relieved from his share of the costs. There had been no tender of the amount due by him, and the result would be that each defendant would be liable for one-fourth of the costs. The form of the judgment would be for the plaintiffs for £707 9s. 0d. against each defendant with costs.

Postea (*September 8th*) the Court ordered the heirs to pay a proportionate share of whatever interest the executors were liable for to the liquidators.

[Attorneys for the Plaintiff, Messrs. Reid & Nephew; Attorneys for the Defendants, Messrs. van Zyl & Buissinne and Gus Trollip.]

CAPE TOWN TOWN COUNCIL V. METROPOLITAN AND SEA POINT RAILWAY COMPANY.

Company — Statutory rights — Threatened expropriation of land—Interdict—Arbitration.

Mr. Schreiner applied, as a matter of urgency, for an interdict on behalf of the Town Council of Cape Town against the Metropolitan and Sea Point Railway Company, in respect of a threatened expropriation of the Cape Town Fish Market. Council read the affidavit of Mr. W. Bromehead, Town Clerk of Cape Town, which was to the effect that the respondent company by an Act of Parliament had obtained rights to construct a line of railway between Cape Town and Sea Point. According to an annexed copy of plans deposited with the Clerk to the House of Assembly, it was never intended that the line should touch the lower corner of Adderley-street or the Fish Market. The Town Council were owners of the Fish Market under a freehold grant from the Colonial Government. On August 31 the solicitors of the Town Council received a letter to the effect that the respondents were not aware that the Town Council possessed any proprietary rights, and that due notice was served on the Town Council eighteen months ago, but that if the Town Council could prove it was entitled to any land near the Fish Market, the company was prepared to acquire such land, and tendered, without prejudice, the sum of £1 per square rood, and requested an answer from the Town Council as to whether it accepted the offer. The directors had accepted a suggestion of Government to take the land near the Fish Market, and were desirous that the work should be done at once, and the line opened for traffic. To that letter the Town Council replied on Wednesday to the effect that the company's letter was the first intimation received by the Town Council; that the company intended taking the Fish Market for the purposes of the line; that the company did not originally intend to take the site of the market, as was shown by the use of the remark that the company had accepted a suggestion of the Government; that the Town Council had no wish to sell or dispose of the Fish Market site, and denied the company's right to expropriate the same without permission and consent; that the fishing industry of Cape Town was of great importance to a large section of the public; that the site of the present market was acquired in exchange for another valuable piece of land; and that the removal of the market would entail considerable monetary loss and great inconvenience to the public and the fishing community. Under those circumstances, the Town Council had to look at the matter not merely from a legal point of view, but from the point of view of the public interests, and after giving the letter of the company full consideration the Town Council was of opinion that the document was most vague in its terms as to what the company desired to acquire. The Council therefore asked for a plan of the land required, together with a plan of all buildings, erections, and sidings to be made, the plan also to indicate in what manner the railway would approach the site,

In reply to that the respondents wrote late on Wednesday afternoon that the site in question was absolutely necessary for the purposes of the railway, and the directors were strongly advised they had power to take it under their Act. That being so, the company desired the Council to refer its claim to arbitration, and it was added that the company intended to take possession of the land on Monday, September 14, at seven a m.

The Chief Justice: Then why apply on the 3rd?

Mr. Schreiner said that the company asked the applicants to appoint an arbitrator, and said that if they did not do so the directors would pay into the bank a sum they considered sufficient.

The Chief Justice: Whatever they do will be of no use to them unless it is legal.

Mr. Schreiner said there was one contingency. If that company's legal position were good—he did not for a moment admit the possibility—the Council, if it did not appoint its arbitrator in time, would lose the right ever to go to arbitration. It was of the greatest importance to the Town Council that the matter should be determined. The company had given notice that by Saturday the Town Council must appoint its arbitrator. Counsel continuing said that the affidavit of Mr. Bromehead proceeded to state that he was informed that on August 31 some of the leading fishermen were told that the company would take the market, and that the fish-dealers would have to vacate their holdings. If the respondents were by law entitled to expropriate the site of the Fish Market, then under the Act they must give the requisite notice and complete arbitration. The Council was a public body, summoned by notice, and it was impossible for it to move with the same speed as private individuals. The Town Council by its Act was debarred from selling or alienating land without the consent of the Governor, which in this case had not been obtained. The Town Council asked for such relief as would prevent the forcible seizure of the site, or the trespass of any of the officers of the company, and in the event of the Court holding that expropriation could be made, that fuller notice should be given. There was absolutely no limit of deviation shown on the plan with regard to the Fish Market.

Mr. Justice Buchanan: They don't intend to take the ground yet.

Mr. Schreiner: On the 14th, my lord.

Mr. Justice Buchanan: Cannot you reply that you do not accept their notice, and will take out an interdict if they take possession of the land?

The Chief Justice: What is to prevent your appointing an arbitrator and reserving to yourself all rights, notwithstanding the appointment?

Mr. Schreiner: It will be said that we submitted to arbitration, and so lost our rights. We know the people with whom we are dealing, and it is very undesirable to do anything of that kind. One would think these people were not serious, but we know that they are, and that they will do these things unless they are stopped. Counsel went on to state that the Town Council had no desire for litigation, but only desired to protect the general interests of the town and the ratepayers.

The Chief Justice, in giving judgment, said that it was somewhat inconvenient to have an application of that sort sprung on the Court without notice. He did not see what the applicants would have suffered by letting the matter stand over and giving notice to the respondents, who did not propose to expropriate the land till the 14th inst. However, as the application was before the Court, he thought the better course would be to direct the applicants to proceed by motion duly served on the respondents, the Court to hear the case on Tuesday next. Meanwhile all proceedings of the respondents in the course of the expropriation of the line would be stopped.

SUPREME COURT.

FRIDAY, SEPTEMBER 4.

Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

In re VICTORIA WOOLLEN CLOTH FACTORY, GRAHAM'S TOWN.

Mr. Graham moved for an order placing the Victoria Woollen Cloth Factory (Limited), of Graham's Town, under the Winding-up Act. Counsel moved on the petition of John E. Wood and Alex. Wilmot, trustees, who stated that at a meeting of the company in February last it was represented that the capital was insufficient, and power was given to create additional shares, but the result was wholly unsatisfactory. The present capital was only £3,567, which the directors wished to raise to £10 000, but owing to the apathy of the public this could not be done. The assets of the company consisted of buildings and cloth, and the directors were without funds to pay debts due and falling due, and expected being sued in respect of certain amounts. The assets were not more than £2,000.

The Court granted an order placing the company under the Winding-up Act, and conferring upon the official liquidator, Mr. Andrew Barclay Shand, secretary of the Eastern Province Guardian Company, the special powers contained in section 15 of the Act, publication to be made in the two Graham's Town newspapers.

SUPREME COURT.

TUESDAY, SEPTEMBER, 8.

[Before the Chief Justice (Sir J. H. DE VILLIERS,) and Mr. Justice BUCHANAN.]

JOOSTE V. KOK.

Collation—Advancement—Promissory note—Prescription—Legitimate portion—Act 23 of 1874, sec. 2.

Although the right to the legitimate portion has been done away with, the rule still remains in force that advancements made by a parent and debts owing to him but not satisfied during his lifetime must, in the absence of any indication of a wish on his part to the contrary, be collated by his children so advanced or indebted for the purpose of ascertaining their shares of inheritance.

This matter was before the Court on the 20th August last, when Mr. Juta appeared for the applicant, and Mr. Searle for the respondent.

On that occasion Mr. Jacobus Johannes Jooste applied for an order requiring the respondent to amend the liquidation and distribution account in the estate of the late Maria Dorothea Jooste (mother of the applicant), dated the 13th June, 1891, by expunging the item of £100 alleged to be due by the applicant to the estate.

It appeared from the account above referred to that the applicant was entitled to an inheritance of £68 9s. 3d., but against this was brought up a promissory note for £100, alleged to have been made by applicant in favour of the aforesaid Maria Dorothea Jooste on the 1st January, 1864. The applicant denied that he had ever signed the promissory note. The questions to be decided were: (1) Was the note genuine, and (2) if so, had the debt been barred by prescription, or was it subject to collation.

Mr. Juta: The note, even if genuine, has been barred by prescription. The doctrine of collation does not apply. In any case compensation has taken place. Counsel referred to Sande (*Decisiones Frisicæ*, 4, 10, 1) and Voet (37, 6, 2, *in medio*).

Mr. Searle: The note is clearly genuine; interest was paid on it for some time. The money was for the advancement of applicant, and is subject to collation. Counsel referred the Court to the following authorities: Voet (5, 2, 61), Van Leeuwen (R.D. Law, vol. 1, 449, 451), Burge (Colonial Law, vol. 4, 671, 678), Grotius (2, 28, 14, and 2, 11, 13), "Hiddingh's Executors v. Hiddingh's Trustee" (4 Juta, 200), and Act 23 of 1874.

The Court took time to consider, and to-day delivered judgment.

The Chief Justice said: The applicant, as one of the children and heirs *ab intestato* of the late Maria Jooste, objects to the liquidation account filed by the executor of her estate on two grounds. The first is that a promissory note for £100, purporting to be made by the applicant in favour of his mother and brought into collation by the executor, was never signed by him; and the second ground is that, even if the promissory note had been duly made by him, it cannot be brought into collation inasmuch as the right to sue thereon had been prescribed at the time of his mother's death. In regard to the first objection, we are satisfied that the applicant was the maker of the note. It is not suggested that his mother, amongst whose papers the note was found, forged it, and it is in the highest degree improbable that the executor would, if he had forged it, have dated it as far back as 1864. The signature to the note corresponds with the signatures to the two affidavits which were made by the applicant for the purpose of the present case, and I am satisfied from the affidavits made on behalf of the respondent that the applicant not only made the note, but on one occasion before his mother's death paid interest on it, and after her death acknowledged the signature as his own. The second objection to the account is a more plausible one, but after a consideration of the authorities, we are of opinion that it cannot be sustained. A brief glance at the history of our law relating to collation will be useful to assist us in arriving at a decision upon the question now raised. By the ancient civil law emancipated children had no right of succession *ab intestato* to their father or other ascendant; but the praetor, in the exercise of his equitable jurisdiction, gave them the *bonorum possessio* just as if they had been in the ascendant's family at the time of his death. This right, however, was conditional upon their bringing into collation their own property, which was reckoned as part of the inheritance, for the purpose of dividing it between them and their brothers and sisters living under their father's *potestas*. This was the origin of the doctrine of *collatio bonorum*, which was afterwards extended by statute and by judicial interpretation far beyond its original application. The Emperor Pius Antoninus extended it to the *dos* which a daughter had received from her father, and a similar extension was made by subsequent emperors to any substantial advancement made by a mother as well as by a father beyond the ordinary maintenance and education which a parent, according to his means, owed to his children. Justinian laid it down generally that

whatever could be reckoned for the purpose of the legitimate portion should be brought into collation (Cod. 6, 20, 20), and he afterwards by his eighteenth novel (c. 6) extended the principle still further by directing that it should apply to the testamentary succession as well as succession *ab intestato* of descendants. The right of the testator, however, to forbid its application was expressly reserved. It would serve no useful purpose to follow the applications and modifications of the doctrine which have been made in the law of the Netherlands. The 29th Article of the Political Ordinance of 1780 substantially adopts the later Roman Law on the subject, but contains no precise statement as to what benefits conferred on children or other descendants must be collated. Treatises have been written by Dutch lawyers upon the question whether or not a simple donation made to a child should form the subject of collation, and no agreement was ever arrived at by them. Vinnius (de Coll., c. 16, sec. 15), after discussing the question at great length, comes to the conclusion that a simple and absolute gift made to a child by either parent need not be brought into collation except in two cases, namely, where the gift was made on condition that it should be brought into collation, and where the necessity of creating equality among the children gives occasion for applying the principle. The conclusion is a very lame one. If the gift was a conditional one it could not at the same time have been "simple and absolute." The second exception must in many cases neutralise the rule, for if some only of the children obtained substantial gifts there must be an inequality requiring to be redressed, and if all the children received gifts collation would not affect the ultimate result. In the present case there is no evidence of any intention on the part of Mrs. Jooste to make a gift of £100. If she had intended to remit the debt she would, instead of carefully preserving the note, have destroyed it. The fact that she did not sue her son does not carry the case much further. She preserved the note, and she may have done so, and probably did, in the belief that when her estate came to be distributed the amount would be brought into collation. As the law stands, the question must after all be a question of intention. A parent is presumed to have intended that there shall be equality in the distribution of his estate among his children. If he has not sued one of his children for a debt owing to him, he cannot be presumed to have intended to forgive the debt, unless he has said so, or done some act from which such an intention can be inferred. If he has advanced a son in trade or business, he may have done so without any intention of requiring payment during his lifetime, but it does not follow that he intended his son to share equally with his other children without accounting for the benefits conferred on such son. Before the passing of Act 23 of 1874, a father was bound to leave a portion of his substance to his children, and was not allowed to disinherit any of them except for certain specified reasons. By that Act complete freedom of testamentary disposition has been introduced, and it is therefore more practicable now than it was before the passing of the Act to give full effect to a father's intentions as inferred from his words or deeds. The fourth section, however, of the Act expressly provides that nothing in the Act contained shall affect or alter the laws of inheritance *ab intestato*. Independently of this proviso it could not have been successfully maintained that the abolition of the right to legitimate portions carried with it the abolition of the law relating to collations for the purpose of testate or intestate succession. The only effect of the Act in this respect is to enable the Court to give effect to a testator's intentions regarding collation in many cases in which before the Act the Court could not have done so. The presumption still remains that a parent intended equality among his children, but the presumption may be rebutted by indications of an intention to the contrary, and the Court is no longer hampered in giving effect to such indications. Thus, if a father during his lifetime has made a simple and unconditional gift to one of his sons, that in itself would be a sufficient indication of his desire not to require such son to collate it with the other children. But if he has advanced a sum to start a son in business, even without taking an acknowledgment of debt or other security for the amount, there would be no such rebuttal of the presumption in favour of equality as to dispense with the necessity of collation upon the father's death. If, however, the father by his will gave any indication of a wish to dispense with collation, the Act of 1874 would enable the Court to give full effect to such wish. Upon similar principles, if a son owes a debt to his father on a promissory note, the fact that no suit is brought on the note during the father's lifetime within the period of prescription does not rebut the presumption in favour of equality. In the case of "Van Heerden v. Marais" (Buch., 1876, 92), the Court held that all debts due by a child to his parent and suretyship paid by the parent for the child can be brought into collation, although such debts may have been incurred and payments made at a time beyond the period of prescription. That was no doubt a case where the legitimate portion of the child was in question, the testatrix having died before the passing of Act 23 of 1874, and therefore the Court was bound to allow the child his legitimate portion. The Court, however, allowed prescribed debts owing to the parent to be brought into collation, and the rule still applies

that whatever advances made during the parents' lifetime could have been computed for the purpose of ascertaining the legitimate portion must be collated for the purpose of ascertaining the children's inheritances, unless the parent wished it otherwise. The conclusion, then, at which we have arrived is that although the right to the legitimate portion has been done away with, the rule still remains in force that advancements made by a parent and debts owing to him but not satisfied during his lifetime must, in the absence of any indication of a wish on his part to the contrary, be collated by his children so advanced or indebted for the purpose of ascertaining their shares of inheritance. The application to amend the liquidation account must therefore be refused with costs.

Mr. Justice Buchanan concurred.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

REGINA V. ANDRIES BOOYSEN.

On the application of Mr. Giddy, the venue was changed to Prince Albert.

ADMISSION.

On the motion of Mr. Juta, Mr. William Meody Baxter, jun., was admitted to practise as an attorney and notary public, the oaths to be taken at Port Elizabeth.

GENERAL MOTIONS.

OUDTSHOORN DIVISIONAL COUNCIL V. RAUBENHEIMER.

Mr. Schreiner applied for a removal of the cause for trial to the Circuit Court, to be held at Oudtshoorn on September 29.

The order was granted.

ALBION MASONIC HALL COMPANY.

Mr. Juta moved for confirmation of the report of the liquidators and for an order in terms of the report, which recommended the acceptance of a tender for £1,000 for the building.

The order was granted.

PETITION OF MAUDE EDITH LIPPERT.

Transfer of landed property.

Under special circumstances leave given to wife married out of community of property, the marital power not being excluded, to sell and give transfer, through her agent, of settled land without concurrence of her husband.

Mr. Searle moved for an order granting authority to petitioner's agent, Alfred Ebden, to act in respect of the sale of certain lots of ground on the Claremont Flats, the property of the petitioner, on a power of attorney executed without the assistance of her husband, Wilhelm August Lippert.

It appeared from affidavit that petitioner and her husband had been married out of community of property, but by the ante-nuptial contract the marital power had not been excluded. The husband's whereabouts was at present stated to be unknown.

Mr. Justice Buchanan: Does not the wife know her husband's whereabouts?

Mr. Searle: I believe not, my lord. He has not been heard of for a considerable time.

Mr. Justice Buchanan: I should like to be satisfied that the wife does not know where her husband is at present.

Mr. Searle: Applications similar to the present have been granted. Counsel referred to Ferreira v. The Registrar of Deeds (5 Juta, 887) and Van der Brock v. The Registrar of Deeds (8 Juta, 296).

The Chief Justice said that there were special circumstances which would justify the Court in granting the order. It was the mortgagee who had called up the bond, and Mrs. Lippert was forced to do something. In the next place, the trustee of Lippert's estate did not object, and the trustees under the ante-nuptial contract consented to the order.

The order was granted accordingly.

TOWN COUNCIL OF CAPE TOWN V. METROPOLITAN AND SEA POINT RAILWAY CO.

Mr. Schreiner moved for an interdict restraining the respondents from entering upon and taking possession of, for railway purposes, certain pieces of Municipal land, on one of which is erected the Fish Market.

Mr. Juta appeared for the respondents.

Mr. Schreiner said that the Court would remember the circumstances of the matter, which was mentioned on Thursday last, when an order was granted staying the proceedings of the company until Tuesday. It might be best if he shortly sketched the exact position of affairs. In 1889 the company obtained an Act giving them power to construct a railway from Cape Town to Sea Point. The first section gave power to the company to work and maintain a line of railway from

a junction with the Western line of railway at or near the Cape Town goods-station, and thence down the Dock-road to Sea Point. The second section said that the railway should commence at such a convenient junction with the Western railway as was agreed to between the company and the Commissioner of Crown Lands. The Government taking advantage, he presumed, of the phrase "at or near," took up the position that, notwithstanding the Act, they would not allow the company to come into the Cape Town goods-yard.

The Chief Justice: Why did the company yield to the Government? The Government is not above the law.

Mr. Schreiner: Quite so, my lord; that matter has never been brought before the Court. After some further negotiations the Commissioner of Crown Lands was said to have consented to a certain deviation of the line, which the Town Council, however, never in the slightest degree endorsed, and which the Commissioner expressly said must receive the written consent of the Town Council. Eventually certain interviews took place between the company and a body called the Railway Committee of the Town Council, a reporting body whose function was to inquire and then report to the Town Council. There was on record a formal resolution of the Town Council objecting to the line being built on the land side of the Dock-road, and that resolution had not been rescinded, nor had the Council agreed to any deviation of the line. It never appeared to the Town Council that the large deviation from the plans of the company would be gone on with, and so matters rested until August 31, when the Council received an offer of £1 per square rood for the site of the Fish Market, and that the Council must make up its mind on the subject by September 2. The Town Council replied, pointing out what its legal rights were, and that the matter in any event could not be settled with such in force. The company answered that the Council must appoint an arbitrator before Saturday, September 5, or lose its rights; whereupon the Court was moved on Friday last, and an order, as he had already said, granted.

Mr. Justice Buchanan: You say the company has no legal right to the land, but that the Town Council has no objection to consider the matter?

Mr. Schreiner: Exactly so, my lord.

The Chief Justice: Is not this the main question to be decided whether there is any right at all to expropriate this land? The matter of when the compensation is to be paid is of minor importance.

Mr. Schreiner: It may be of importance in this case. The property which it is proposed to take is of great value.

The Chief Justice: I think we had better decide the more important question first.

Mr. Juta read an affidavit of Mr. John Walker, in which it was stated that when the Governor gave consent to the deviation now contemplated by the company, under which the Fish Market was to be used, the market was not the property of the Town Council at all, but belonged to the Government. By the plan sanctioned by the Governor and submitted to the Council, it was shown that the line would cut clean through the Fish Market. In the course of interviews between the Railway Committee of the Town Council and the company, the committee agreed to a plan whereby the Fish Market was arranged to be utilised for the purposes of the railway company.

Mr. Justice Buchanan: But has the committee the power of binding the Council?

Mr. Schreiner: Not at all, my lord.

Mr. Juta: Well, the Railway Committee seems to have power of suing in this case, at all events.

The Chief Justice: Has the Government approved of the plan you have now in contemplation, Mr. Juta?

Mr. Juta: Yes, they say they have no objection to it.

Mr. Justice Buchanan: And where is the consent of the Town Council?

Mr. Juta said that the land did not belong to the Municipality at all. The first contention was that, as a fact, the consent of the Council was not really requisite; secondly, that consent, if power of consent were possessed by the Town Council, had already been given. Counsel went on to state that the site of the Fish Market was absolutely required for station purposes, and would be barely sufficient for the requirements of the company.

The Chief Justice: What is the objection to having the station on the land side? Is not that still better?

Mr. Juta said that was the original idea, but that the Town Council objected to its being carried out. Counsel then read the affidavit of Mr. C. E. Solomon, secretary of the company, to the effect that the Town Council had been informed of the fact that the Governor had intimated his consent to the deviation, and signified no objection, that the land forming the site of the Fish Market was not transferred to the Town Council till June last, and that several members of the Town Council were utterly opposed to the present action.

The Chief Justice said that the point Mr. Juta had to meet was as to whether the company possessed the consent of the Government, if, as counsel stated, the Fish Market belonged to the Government and not to the Town Council.

Mr. Schreiner then proceeded to argue the case for the applicants. Counsel read the affidavits of Mr. Bromehead (Town Clerk), Mr. D. P. Graaff (Mayor), and Mr. P. J. Stigant. The point had been urged, he said, that the Council had not taken

transfer of the Fish Market site till June last, but as a fact the property of the Fish Market was specifically vested in the Town Council by the Municipal Act passed so far back as 1882. The line taken by the Town Council was simply that the company must keep to its Act. It was said that the Government had given free consent to the plan now proposed to be undertaken by the company, but, as a fact, consent was only given on the understanding that the Town Council had no objection. The Government, it was true, once signified its approval of a plan whereby the company would be authorised to construct a special road which would take in the Fish Market, but that plan was not before the Court at all. The Town Council had in no way endeavoured to thwart the company. He was instructed that the Council simply desired to guard the interests of the citizens; the company had not approached the Council in a reasonable way, but had suddenly changed all its previous ideas, and demanded possession of the land practically without notice. There was no wish to stop the company permanently, but he contended that the company must approach the Council and obtain its consent before carrying out any plan entailing the expropriation of the Fish Market.

Mr. Juta said that although it was said that the Town Council had no wish to delay the progress of the undertaking, the facts did not bear that construction. In April last a letter was sent to the Town Council, embodying the plan now before the Court, which included the taking over of the Fish Market, and since that time the Council had not communicated one word to the company. What the company would like to do was to put the Council in the witness-box, and ask what had become of the report of the Railway Committee, and why the Council kept quiet until legal title of the Fish Market was obtained in June last. By the company's Act the line could be deviated from with the consent of owners of land concerned and the Commissioner of Crown Lands. Before June last the Council clearly did not own the Fish Market by any legal title. The Government was then the owner, and as such gave consent to the company's plan.

The Chief Justice said that if all the company asked was that it should be empowered to make a special road, widening the Dock-road, there would be no difficulty about that.

Mr. Juta: In that case the Fish Market buildings go all the same.

The Chief Justice: You mean that we shall have to part with some wretched shanties which will have to go sooner or later?

Mr. Juta said the company was hounded from pillar to post—from the Government to the Town Council, and back again.

The Chief Justice: If everyone's hand is against you, it is desirable in your own interests that you should act with all the more caution.

Mr. Juta said the Railway Committee of the Town Council was suing in the present case without the consent of the Town Council, and there was a strong feeling in the Council against the company being hampered in this way.

After further argument,

The Chief Justice gave judgment. His Lordship said the applicants in the case, the Town Council of Cape Town, were in lawful possession of what was known as the Fish Market, and it was proposed by the respondents, the Suburban Railway Company, to encroach upon the Fish Market for the purpose of constructing a railway-station, and the main object of the present application was to restrain the respondents from encroaching upon the Fish Market for the purpose of erecting a railway-station. Now, it was common cause that the respondents were not entitled to encroach upon this land unless they had got the consent of the owners, and it was urged on their behalf that that consent had virtually been given by a letter which was addressed by the Commissioner of Crown Lands to the Assistant Commissioner in Cape Town. He thought the Assistant Commissioner was quite justified in refusing to give confidential correspondence between him and his chief for the inspection of the respondents, and no consent which might have been in any way expressed by the Commissioner to the Assistant Commissioner would affect the present case. It would only assist the respondents in case it had been communicated to them, and there was no allegation that any such communication was made. Therefore it was quite clear that the respondents must be interdicted from constructing any railway-station upon the site of this Fish Market. In the course of argument, it was pointed out that on April 17 last a letter was addressed by the Commissioner of Crown Lands to the respondent company, to the effect that His Excellency the Governor in Council had been pleased, in terms of section 8 of the respondent company's Act, to consent to a deviation of the line from the original route proposed, on the understanding that the Dock-road should be widened to 100 feet throughout the entire length of it that was traversed by the railway, and that the work should be done to the satisfaction of the City Engineer. It was contended that the letter authorised the company to encroach upon the Fish Market to the extent of some feet, and widen the Dock-road. Now, if in the case it were clear that only the Fish Market was in question, he should have been prepared to hold that that was a consent to such a deviation as would effect an encroachment upon the Fish Market, but the Court must bear in mind that the Dock-road at that point was at that time vested in the Town Council

of Cape Town, that the Council was to all intents and purposes the owners of the road at that point and that inasmuch as the deviation authorised by the Commissioner was a deviation upon the Dock-road, which then belonged to the Town Council, the Council was entitled to notice before the deviation was made, and the deviation could not be made without its consent. On that simple ground he was of opinion that the authority given by the Commissioner of Crown Lands did not assist the respondents in any way. Even for the purpose of making the deviation authorised by the Commissioner on April 17, the consent of the Town Council was still required, as that of the owner of the road at that time. For those reasons he was of opinion that an interdict ought to be granted, restraining the respondents from in any way encroaching or entering upon any part of the Fish Market for railway purposes, and that the respondents must pay the costs of the application. Of course it would be competent for the respondents at any time to bring an action to set aside the interdict.

Mr. Justice Buchanan concurred, and said that with reference to a remark that the respondents were being driven from pillar to post, he thought they had only themselves to thank for it. Persons preparing a railway scheme for Parliament ought to prepare a proper scheme and have proper plans before doing so, and when the plans were before the House they should be prepared to adhere to them or only to vary them within clear and legal limits. In that case he thought the respondents had totally failed to obtain from the owners of the property their consent to a deviation. The utmost that the consent of the Commissioner amounted to was the consent to make a road. It did not give the right to expropriate one inch of the Fish Market.

The Chief Justice said he should like to add that he thought both sides had been very unreasonable. The Town Council had kept the respondents waiting months and months. He did not think the Town Council had treated the respondents at all in a proper spirit, but it had the law on its side.

[Attorneys for the Council, Messrs. Fairbridge and Arderne; Attorneys for the Company, Messrs. Wessels & Standen.]

SUPREME COURT.

WEDNESDAY, SEPTEMBER 9.

[Before the Chief Justice (Sir J. H. DE VILLIERS), and Mr. Justice BUCHANAN.]

ARMOUR V. MURRAY AND ST. LEGER.

Debt — Action for — Exception to Magistrate's jurisdiction—Reduction of counter-claim—Appeal.

Sir T. Upington, Q.C., for the appellant (defendant in the Court below) and the Acting Attorney-General, Mr. Searle, for the respondents (plaintiffs in the Court below).

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town. A suit was instituted by Murray & St. Leger against Armour to recover the sum of £17 6s. 1d., being the balance of money advanced to him for the purpose of bringing out his wife and child to the Colony. There was no contest as to £17 6s. 1d. being the sum in dispute.

Sir T. Upington said there were two questions to be argued. The first was of a technical character. Exception was taken before the Assistant Resident Magistrate to the effect that Armour had a counter-claim against Murray & St. Leger for wrongful dismissal to such an amount, £42, as ousted the jurisdiction of the Resident Magistrate's Court. That matter was dealt with in the case of "De Jager v. De Jager" (3 Juta, 69), when the Court held that in order for the jurisdiction of the Resident Magistrate to be ousted there must be some evidence as to the *bona fides* of the counter-claim. In the present case the Assistant Resident Magistrate did take some evidence, that of Armour himself, who stated that he came out under a contract, his duties comprising bookbinding in all its branches. He appeared to be a man of good character, and was described by an eminent bookselling firm in Edinburgh as sober, steady, and obliging, and competent for the best and finest work.

The Chief Justice said that when the Magistrate overruled the objection Armour did not appeal, but reduced the counter-claim to £20 to bring it within the jurisdiction of the Court.

Sir T. Upington said that had occurred to him. If he had been consulted he should have recommended an appeal at once, instead of the reduction of the counter-claim.

Mr. Justice Buchanan: Supposing the Magistrate had given judgment for £10 on the counter-claim, could you then have appealed?

Sir T. Upington said no, and that he quite saw

the force of the objection. He had a further point, however, that the Magistrate was quite in error in giving judgment for the whole amount of the debt seeing that there had been a novation. It appeared from the evidence that a few weeks after Armour arrived, Mr. Harry Solomon, who seemed to have charge of this branch of the business of Messrs. Murray & St. Leger, declared him incompetent for certain work. Mr. Solomon, in his evidence, said it was then agreed that the contract should be cancelled, but his memory appeared to be at fault there, for a letter which was written about that time to Armour amounted practically to his dismissal. He went into the service of Messrs. Richards, where he was earning £2 5s. a week, as compared with £4 at Messrs. Murray & St. Leger. It was arranged that Armour should commence to pay back to the firm the money advanced for the passage of his wife and child at 10s per month, as soon as he could afford, and he paid his instalments in January, February and March, 1890, but seemed then to become irregular in the payments. In September, 1890, the firm accepted £1 from him, which brought the monthly instalments up to the June previous. The case was brought in December, 1890. At that time he contended that Messrs. Murray & St. Leger could only claim the five monthly instalments which were due and unpaid, instead of which they claimed the whole debt, £17 6s. 1d. There was no allegation against Messrs. Murray & St. Leger; on the contrary, they acted with great consideration, but he submitted that the Assistant Resident Magistrate was in error in giving judgment for the whole of the debt, when only £2 10s. was claimable.

Mr. Searle having shortly replied for the respondents,

The Chief Justice, in giving judgment, said he did not think the appeal could be sustained on either ground. If the defendant in the Court below had appealed as soon as his exception was overruled, he might have had a good ground of appeal, but he had virtually waived his right to appeal by reducing his counter-claim and taking his chance of getting judgment for £20. Having failed in that, he now sought to appeal. As to the second ground of appeal, it was clear that a novation must be clearly proved, and could not be presumed from loose expressions. The plaintiffs had in effect said that so long as Armour paid his monthly instalments they would not sue, but as soon as there was default the original debt became due in full. The appeal must be dismissed with costs.

Mr. Justice Buchanan concurred.

[Appellant's Attorney, J. Hamilton-Walker; Respondents' Attorney, C. C. Silberbauer].

SUPREME COURT.

THURSDAY, SEPTEMBER 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS), and Mr. Justice BUCHANAN.]

DEEDS EXAMINERS.

Appointment under Act 19 of 1891.

The Chief Justice said that under the recent Act relating to the Deeds Office it was provided that the Court should appoint three examiners, one of whom was to be the Registrar of Deeds himself. The Court would appoint the Registrar, Mr. Hofmeyr, and Mr. Juta.

NEL AND TIRAN V. LIND AND TIRAN.

Negligence—Executors—Alleged maladministration of estate—Damages.

Mr. Schreiner and Mr. Molteno, for the plaintiffs; Mr. Searle and Mr. Webber for the first-named defendant, and Mr. T. L. Graham for the second defendant.

This was an action for £5,000, damages alleged to have been sustained by reason of the negligence and maladministration of the defendants. The action was instituted by Mrs. S. P. Nel (born Tiran) and Mr. A. A. W. Tiran against Messrs. C. M. Lind and C. F. Tiran, in their personal capacities as executors testamentary of the late Jean Pierre Tiran, and as tutors testamentary of the minor children of the said Jean Pierre Tiran. The plaintiffs are the daughter and son respectively of the late Mr. J. P. Tiran, who died at Oudtshoorn on the 5th November, 1881. By his last will and testament Mr. J. P. Tiran appointed his children his sole heirs, and the defendants executors of his estate and tutors of his minor children. The defendants accepted the trusts imposed by the will, and took out letters of administration and of confirmation. By the terms of the will all the landed property in the estate (subject to the reservation of a certain portion) was to be disposed of by public auction within three months of the testator's death, and the proceeds distributed amongst his heirs (seven in number). In February, 1882, the defendants sold the property above referred to, one of the conditions of sale being that the purchase price should be paid in equal instalments at the expiration of six, twelve, eighteen, and twenty-four months from the day of sale, and that two sufficient sureties should be provided by the purchaser

to secure the due fulfilment of his obligations under the contract of sale and purchase. The second defendant, C. F. Tiran, bought the property for £4,500, and subsequently he and his co-executor cancelled the sale and privately re-sold the property to one William Knipe Edmeades for the sum of £5,000, payable in three equal instalments at the expiration of two, four, and six years from the date of the sale. The defendants neglected to require the purchaser to furnish two sureties for the due fulfilment of his contract, and afterwards extended the periods of payment to four, six, and eight years respectively, from the 14th February, 1882. It was a condition of the latter sale that transfer should only be passed to Edmeades when he had paid the first instalment of £1,666 13s. 4d. with arrear interest. The defendants, however, on the 11th September, 1883, gave Edmeades transfer, and neither then nor at any time subsequent has any part of the purchase price been paid. On obtaining transfer Edmeades passed a bond (not containing the general clause) for £5,000, specially hypothecating only the property transferred, and in August, 1883, one George Mason Edmeades agreed with the defendants to become surety for the due performance by W. K. Edmeades of his obligations as purchaser of the property. The declaration alleged that the defendants as executors acted wrongfully, unlawfully, negligently, and in breach of their duty in accepting the security of the said bond and the security as sufficient. Further, that the position of the said G. M. Edmeades was at the time when he was so accepted as surety by the defendants one of great financial difficulty and embarrassment, and that the defendants were well aware of that fact. Subsequently the estates of both W. K. Edmeades and G. M. Edmeades were placed under sequestration as insolvent, and no portion of the purchase price of the property was ever paid to the estate of J. P. Tiran, but at the sale in the insolvent estate of W. K. Edmeades the defendants purchased the property for £2,500, and afterwards sold it by public auction for £1,500. The declaration also alleged that the estate of J. P. Tiran was put to great expense in connection with transfers, litigation, and otherwise, and large amounts of arrear interest due from W. K. Edmeades remained at the date of his insolvency unpaid. And that by reason of the wrongful, unlawful, and negligent acts and omissions of the defendants, and of their breaches of duty and maladministration as executors, the estate of J. P. Tiran had sustained damages in the sum of £5,000 sterling, which sum the defendants are jointly and severally liable to pay *de bonis propriis* into the said estate for the benefit of the plaintiffs and their minor brothers and sisters. There was also a demand that true, correct and separate accounts, supported by vouchers, should be filed by the defendants with the Master, exhibiting their administration both as executors and tutors, and that such accounts when filed should be rebated.

The defendants in their plea denied most of the allegations in the declaration, and alleged that they had acted *bona fide*, with due diligence, and in the best interests of the estate and for the benefit of the testator's children. The first-named defendant (C. M. Lind) claimed in reconvention from the second-named plaintiff £40, alleged to have been personally lent to him in December, 1890.

Mr. John Cairncross, auctioneer and notary, and trustee under the ante-nuptial contract of the plaintiff Mrs. Nel, gave evidence that in 1883 he would not have taken Mr. George Mason Edmeades as surety for £5,000. He had been executor in many estates, but would not give to any seller such terms as payment in four, six, and eight years. He did not know of any other case than this in which transfer had been given before any of the capital had been paid. He had investigated the estate accounts in the Master's Office, and they were for the most part unvouched and undated. It was impossible to discover the accounts of each heir; all were taken together. The witness proceeded to explain in detail his criticism of the accounts filed by the executors.

By Mr. Searle: In 1882 he was not living in Oudtshoorn, but he was there continually on business. It was not customary to sell landed properties without sureties. In 1882 and 1883 his knowledge of the position of G. M. and W. K. Edmeades was derived more or less from hearsay.

Mrs. S. P. Nel, one of the plaintiffs, stated that with regard to the tutorial accounts, in which £550 per year was charged for the maintenance of herself and the other six heirs, the life lived by the children was very simple and inexpensive. She did not believe it cost over £20 per month to keep the children.

By Mr. Searle: She married in August, 1888. She and two brothers were educated at George, where they stayed some years. She left school in 1886. After 1886 she and her brothers lived on the property which the executors transferred to Edmeades. Her brother had free use of the property. There were two houses on the estate, in one of which the family lived; the other was let, and the family received the proceeds. It was not true that during her minority she constantly applied to Lind for money. She applied occasionally, but that was because her brother received all the money, and she and her sisters had not enough money for clothes. She could not say how much her brother received. She received a good education, having been for three years at the best school in George. She considered that £300 a year was quite enough for the maintenance of all the

children. It was not true there was a family quarrel. She and her brothers and sisters were on good terms.

By Mr. Graham: She could not say if her school fees at George were £15 a quarter.

Mr. B. J. Keyter, M.L.A., sworn appraiser, deposed that for about thirty years he had carried on business as an auctioneer in the Oudtshoorn district, and at all his sales the custom was to claim sureties at land sales. He knew the circumstances of farming life, and thought £40 for each child per year was sufficient payment for children brought up as the Tiran children were. In his experience as an agent he never allowed transfer of property before he received some payment on account of the capital. He would never accept a bond unless it contained the general clause.

By Mr. Searle: He considered George the best place for education in that part of the country. His son at school there cost him about £70 a year, inclusive of school fees and board. He left off business as an auctioneer about six or seven years since.

By Mr. Graham: The deceased, Mr. Tiran, occupied a good position, and the school at George was the class of place to which the Tiran children would be sent.

By the Court: He could not say if George Mason Edmeades was a wealthy man.

Mr. Louis Nel, husband of the plaintiff Mrs. Nel, said that living in Oudtshoorn was not dear. He had seven children by a former wife, and kept them on £16 a month. He considered the Tiran children ought to have been maintained for £20 a month, exclusive of the cost of education.

By Mr. Searle: He asked Mr. Lind for a statement of the funds of the estate a week after he was married, but he had never received any statement. Mr. Lind objected to Miss Tiran's marriage with witness. It was not true witness was entirely without means. He was a farmer, and was earning a living on the estate.

Mr. T. B. Herold, examiner of accounts in the Master's Office, deposed that up to two years ago the Master did not insist upon the accounts of tutors or executors testamentary being vouched. If vouchers, however, were sent up they were filed. Now all accounts were required to be vouched.

Mr. George Wallace, valuator to the Oudtshoorn Divisional Council and Municipality, said the property sold to W. K. Edmeades was valued at £3,165. In 1884 the property was valued at £2,950. Witness proceeded to refer to the accounts in detail, and said that from the accounts it appeared that the interest received in the estate was insufficient for the maintenance and that the remainder was drawn from the general funds in the estate. The accounts, in his opinion, were clear, and were a full statement of the affairs of the estate.

By Mr. Schreiner: His only connection with the estate was that of an accountant. He knew nothing of the merits of the case.

By the Court: The accounts furnished to the Master corresponded with the books of Mr. Lind.

SUPREME COURT.

FRIDAY, SEPTEMBER 11.

[Before the Chief Justice (Sir J. H. DE VILLIERS), and Mr. Justice BUCHANAN].

ANDERSON AND MURISON V. THE COLONIAL GOVERNMENT.

Guano Islands—Right of landing—Disturbance of birds—Salvage—Interdict.

Section 446 of the Merchants' Shipping Act of 1854 (17 and 18 Vic., cap. 104) has no application in this Colony, and the effect of the General Law Amendment Act of 1879 was not to introduce that section.

Mr. Schreiner for the applicants; Mr. M. Searle (Acting Attorney General) for the Colonial Government.

This was an application, on notice, by Messrs. Anderson & Murison, merchants, of Cape Town, to the Acting Commissioner of Crown Lands and Public Works (Mr. Merriman), calling upon him to show cause why the Government should not be interdicted from further restraining applicants from recovering the residue of the cargo washed up on Dassen Island from the wrecked steamer Wallarah, or still to be washed up or lying in the hold of the vessel; secondly, to show cause why it should not be declared that the applicants were entitled to remove for their own use and benefit any cargo washed ashore in any part of the Colony and lawfully purchased and acquired by them.

Mr. Schreiner read the affidavit of Mr. T. J. Anderson, one of the applicants, to the effect that the Wallarah was wrecked on the shores of Dassen Island on August 1. Part of the cargo was salved soon after the wreck, and thereafter the wreck, with the whole of the cargo still on board and washed up, was sold at public auction and his firm became the purchasers. In making the purchase his firm relied upon the cargo washed up, and to be washed up, as well as that still in the vessel. After the purchase the Magnet was despatched to the island, but the Government representative

there refused permission for the cargo to be collected. He then waited on Captain Jackson, the Government agent for the guano islands, and that gentleman stated the conditions upon which his firm would be allowed to collect their cargo. He said he would allow seven workmen to land on the island, and also said he would write deponent a letter on the subject. On August 27, Captain Jackson wrote to him, but as that letter laid down conditions which his firm could not accept, it was handed to their attorneys, who were instructed to see Captain Jackson. The latter's conditions were that seven men would be allowed to land, it being clearly understood that Mr. Almeida was in charge of the island, and that no one was to wander in the vicinity of the birds. As the result of the solicitor's interview, Captain Jackson on August 29, wrote to deponent, peremptorily revoking the permission previously given. He received information to the effect that the Government asserted an unqualified right to prevent all persons, except Government servants, landing on the island at all, for fear they should scare the birds. He thereupon instructed his solicitors to see the Acting Commissioner of Crown Lands, but that gentleman was out of town. They wrote to the Assistant Commissioner, however, and after reciting the circumstances of the case, the attorneys stated that the possibility of the birds being scared away seemed remote, since there were then two separate parties of workmen engaged on the island, one for the purpose of collecting guano, and the other engaged in the erection of a lighthouse. His firm was perfectly willing to take the greatest care that the birds were not disturbed, but decidedly protested against their rights being interfered with by the Government. Some days after the receipt of his attorneys' letter the Government wrote that if he would respect the conditions laid down by Captain Jackson permission would be given; further than that the Government was not prepared to go, unless the parties interested in the wreck were ready to pass a bond for £5,000, guaranteeing the Government against the loss of the season's guano by the birds being scared away. Deponent wrote back, stating that he utterly declined to accept those conditions, and regarded the proposal that he should pass a bond for £5,000 as preposterous. On September 4 a further letter was written to Government, reporting that the steamer Magnet was not only refused permission to land his firm's workmen, but was actually warned off from the shore. In order to avoid a conflict, a landing was not forced, but the warning not to approach close to the rocks was properly disregarded. The affidavit proceeded to state that applicant's firm was quite ready to take all due care that their servants should confine themselves to places where the cargo was and not disturb the birds, but were not prepared to pass a bond for £5,000, as the Government asked. The vessel had 4,100 tons of cargo on board when she went ashore, and only 675 tons had been recovered.

Mr. Justice Buchanan: The Government is willing to give you the permission offered by Captain Jackson, or allow you to pass a bond.

Mr. Schreiner: Yes. In other words, they say we shall not come upon the beach.

The Chief Justice: I did not read the letter so. To whom does this island belong?

Mr. Schreiner: I suppose it is Crown land, my lord.

The Chief Justice: Of course, to go on the land the permission of the owner must beobtained.

Mr. Schreiner: Not under the Merchant Shipping Act of 1854, which is in force here.

Mr. Searle: That Act is not in force here.

The Chief Justice: Is there no law relating to guano?

Mr. Schreiner: No; our law is silent on the subject. There has been no broad objection hitherto to people landing.

Mr. Searle: There has always been objection.

Mr. Schreiner: I am speaking of people landing on the island generally.

Mr. Searle read the affidavit of the Assistant Commissioner of Crown Lands, Mr. H. McNaughton, to the effect that when the ship was wrecked permission was asked for the salving of goods, and was granted, and for nearly three weeks salvage went on, the remainder of the cargo being afterwards advertised for sale by auction. Due notice was given that no further salvage operations could be permitted, it having been represented that the nesting season was too far advanced to permit of the birds being disturbed. The Government was still willing to permit the landing in terms of Captain Jackson's letter, or to accept a bond for £5,000 as guarantee against the loss of the season's guano yield. As a fact it was stated in the advertisement of the sale that arrangements with the Government would have to be made with regard to the landing of any wreckage purchased. That notice did not appear in the first advertisement, but upon representations being made it was inserted in succeeding advertisements. The fact was also stated at the sale.

Counsel also read the affidavit of Captain C. H. Jackson, Government agent for the guano islands, to the effect that he had refused the permission asked by Mr. Anderson, for the reason that if men were allowed to wander over the island the guano yield, valued at £5,000, might be lost. If the birds were disturbed they would desert the island, possibly for years. Mr. Anderson had refused to give a guarantee that the birds should not be disturbed, and had treated the question of the guano as a matter of no moment. He believed that all the goods of value had been removed.

The affidavits of Messrs. Riley & Roe, guano traders, were to the effect that the birds commenced to arrive early in August, and would leave if they were disturbed. The Dassen Island guano yield was worth over £4,000. Captain Spence, a guano merchant for thirty years, also deposed that birds would leave the island if disturbed while nesting.

Mr. Anderson, in an answering affidavit, said that he had not understood, and did not understand, that he had to obtain leave to remove his own lawful property. He did not apply to Jackson for leave to remove that property. He had received information that Almeida had removed wrecked goods surreptitiously.

The affidavit of Mr. C. A. Fairbridge was also read, and one by Gasiep and two fellow-workmen lately employed on the island by Government, who stated that for a period of three weeks they were employed by Almeida picking up cargo, which they took to Almeida's house. The birds on the island were duikers and penguins, which were not easily frightened, and when Almeida employed them in picking up cargo they were not warned to keep away from the birds. Mr. A. J. Dawson, clerk with Messrs. W. Anderson & Co., stated on affidavit that when he was engaged salving cargo he had sixteen men there, who were continually over the island, but did not frighten the birds away.

The Chief Justice: Does the Government seek to keep you from landing on the beach?

Mr. Schreiner: Yes.

The Chief Justice: Surely not. The beach is common to all. I don't think the Government will say they prevent your landing on the beach. It is an elementary principle of law that the beach up to high-water mark is common to all. If that were the only question at issue it could be disposed of at once.

Mr. Searle said that was not what Mr. Anderson wanted. He desired permission to roam at will all over the island.

After argument,

The Chief Justice delivered judgment. He said the Court could not grant an interdict unless the right of the applicants was clearly made out. In the present case the applicants mainly relied upon the Merchant Shipping Act, as giving them the right to follow up the goods which had been wrecked, wherever those goods might be. In his opinion, section 446 of the Merchant Shipping Act of 1854 had no application whatever in this colony. The effect of the Colonial Act of 1879 was not to introduce that section into this colony at all. The Court must be guided in the case by the common law of the Cape Colony. By the common law it was undoubtedly the fact that the beach up to high-water mark was open to all, and if that case were merely a question as to whether the Government was entitled to prevent the applicants from going up to high-water mark for the purpose of removing wrecked cargoes, he should have no hesitation in granting an interdict against the Government, but in his opinion that was not really the question before the Court. He did not understand there was any desire on the part of Government to prevent the applicants from going on the beach only. The Government was willing to give permission for men to go to the landing place and to salve goods, and that was a concession the applicants might well have accepted. The letter of Captain Jackson was at one time withdrawn, but the Government was now prepared to abide by its terms. In that letter it was stated that, with refererce to the application to land seven men upon Dassen Island for the purpose of diving operations in connection with the wreck of the steamer Wallarah, provided it was understeed to be solely for that purpose and that the operations would terminate within a reasonable time, permission would be granted; the men, however, to be informed that Mr. Almeida was in charge of the island, and had strict injunctions not to allow anyone to wander in the vicinity of the birds Should the party transgress the regulations of the island, it was stated that they would have to return. Now, it might be true that part of the cargo was valuable, but the annual profits from the birds were very much more valuable, and the Government was entrusted with the duty of looking after the island and seeing that the birds were not disturbed, and in his opinion Captain Jackson was quite right in insisting upon conditions of that kind before allowing people on the island on behalf of the applicants. The whole of the correspondence showed that the applicants did not insist only upon the right of remaining at the high-water mark, but also going on the island itself, and in his opinion they could not exercise any such right without the consent of the owners, the Government. It might be that there were some goods carried above high-water mark; if so, the applicant could bring his action against the Government to compel them to deliver up those goods. They could not, however, go on the land beyond high-water mark without consent, and in his opinion the interdict must be refused with costs. It was only right he should add that he thought Government ought to give some reasonable facilities to the applicants; for instance, where goods were immediately above high-water mark the Government ought to allow them to be removed. He did not understand there would be any objection to that course being taken.

Mr. Justice Buchanan concurred.

NEL AND TIRAN V. LIND AND TIRAN.

The hearing of this case was resumed; Mr. Schreiner and Mr. Molteno, appearing for the plaintiffs; Mr. Searle (Acting Attorney-General) and Mr. Webber for the defendant Lind, and Mr. Graham for the defendant Tiran.

Mr. G. P. Kent, bookkeeper, continued the evidence for the defence, and said that the banking account in the estate was frequently overdrawn.

By Mr. Schreiner: No interest was either allowed or charged.

Mr. C. Black, bookkeeper, deposed that he had prepared a general summary of the accounts, and that in April last Mr. Andries Tiran, one of the plaintiffs, expressed himself to witness as completely satisfied with the accounts.

By the Court: He could not say whether on that occasion Tiran was aware of the way in which the property had been transferred to Edmeades

Re-examined: The books balanced correctly.

Mr. C. M. Lind, one of the defendants, attorney, auctioneer and agent, gave evidence that the deceased, Mr. J. P. Tiran, bought the property for £3,000. The property was offered for sale in February, 1882. The bidding was poor, and the firm offered a bonus of £75 to whoever would bid £4,500. Mr. C. Tiran bid that sum, and the property was knocked down to him, but at once Mr. W. K. Edmeades offered £5,000 for it, whereupon witness at once cancelled the sale to Tiran and sold to Edmeades, whose position was then good. On the day of the sale witness sold Edmeades goods to the extent of £549 on twelve months' credit, and Edmeades duly paid for them. It was not at all a common practice to insist upon sureties at land sales. Several months before the sale of this property he sold property for over £5,000, and did not ask for sureties. He knew of instances where property was sold at a credit of ten years, and the credit given to Edmeades was not excessive. Edmeades paid an exorbitant price for the estate, which was at no time worth more than from £2,500 to £3,000. Immediately after the sale, Mr. Edmeades was asked to name his surety, and named his brother George, whose suretyship witness accepted. In 1883 he asked the manager of the Cape of Good Hope Bank at Oudtshoorn with regard to the financial position of the two Edmeades, and was told that W. K. Edmeades's bond without the general clause and G. M. Edmeades's suretyship formed first-rate security for a debt of £5,000. When he sold the property to Edmeades public confidence in his financial stability was unbounded. He was one of the wealthiest men in the district, and witness thought he was doing well in the interests of the estate in obtaining such a purchaser. Edmeades was bidding at the sale, and went as far as about £4,400. He commenced suing Edmeades as soon as he stopped his payment of interest. The brothers Edmeades afterwards surrendered. At no time had undue or extravagant charges been made, but he had in all respects treated the children as if they were his own. Plaintiff's husband, Louis Nel, had on no occasion demanded from witness vouched accounts in his wife's estate. All he had asked was that his wife's inheritance should be kept separate.

By Mr. Schreiner: He was not aware until a few days ago that Edmeades was at the sale and bid £4,400. He believed that £5,000 was an absurdly high price for the property at any time. He thought the estate was benefited by the cancellation of the sale to Camille Tiran. He emphatically denied the statement that for months he never went near the minors during the time the children were living in charge of Andries Tiran. It was only when the engagement of the plaintiff Mrs. Nel to her present husband was announced that there was any disagreement. When Andries Tiran was in charge of the family and estate he was a minor, but a minor with a long head.

Re-examined: His commission as tutor testamentary amounted to about £5 or £6 a year.

Mr. M. D. Savory, manager of the Standard Bank at Oudtshoorn, stated that in 1883 Mr G. M. Edmeades dealt at the bank. At that time his credit was good, His Divisional Council valuation was £67,000, and beyond that he had other properties to the extent of £17,000. He dealt largely in ostrich feathers, and had a separate feather account, in connection with which he deposited £1,000 per month. He had £30,000 unmortgaged property after passing a £50,000 bond to the bank.

Mr. C. F. Tiran, examined by Mr. Graham, related the circumstances of the sale of the property, and said that at all times he and his fellow-executor Mr. Lind had acted in the best interests of the children. At the time he was receiving £450 per year for the maintenance of the children they were costing him much more. When George Mason Edmeades was accepted as surety, witness considered him in an excellent financial position.

Mr. Schreiner having addressed the Court for the plaintiff,

The Chief Justice remarked that the case appeared to be of much greater importance than had at first appeared. The Court was the upper guardian of all the minors, and it might be better if the remainder of the argument were held over with a view to a curator being appointed to represent the minors, and the whole matter being determined.

Counsel offered no objection to that course.

The Chief Justice appointed Mr. Tredgold *curator ad litem*, and ordered all the papers to be submitted to him. The Court would state at a later stage when the case could be reheard.

SUPREME COURT.

SATURDAY, SEPTEMBER 12

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.

PROVISIONAL ROLL.

MILLS V. W. A. MAREE.

Mr. Maskew moved for provisional sentence on two promissory notes for £78 14s. 9d. and £67 12s. 10d. respectively, less £40 3s. 6d. paid on account.—Granted.

MILLS V. J. C. C. REYNEKE.

Mr. Maskew applied for provisional sentence on two promissory notes for £62 3s. 8d. and £41 8s. 9d. respectively, less £40 paid on account.—Granted.

WALKER V. T. H. C. DICKSON.

Mr. Jones moved for a decree of civil imprisonment on an unsatisfied judgment for £8) 9s., and £6 9s. 6d. costs.—The decree was granted, to be suspended on condition that defendant pay £5 per month, the first payment to be made on the 1st October next, and an equal sum on the first day of every succeeding month.

BREDA'S ASSIGNEES V. H. B. EDWARDS.

Mr. Maskew applied for provisional sentence on an account for £145 15s. 3d., for goods sold and delivered.—Granted.

SOLOMON V. WOOLF.

On the application of Mr. Schreiner the rule *nisi* granted in this matter on the 25th ulto, was discharged with costs. Woolf not having complied with the order of Court made on that occasion.

WOODMAN V. ROBINSON.

Master and Servant—Alleged wrongful dismissal—Damages—Disobedience of servant—Justifiable dismissal.

Mr. Graham for plaintiff; Mr. Juta for defendant. This was an action for damages for wrongful dismissal. The declaration set forth that the plaintiff entered into a contract in London with the defendant, under which she was to come out to the Cape as cook at a salary of £50 per annum. In terms of this contract she came out in the Dunottar Castle, arriving here on the 28th April last. In the agreement it was stated that if she remained in the service of the defendant eighteen months her passage money would be paid back to England. The plaintiff refused to sign the new agreement drawn up in Cape Town, and at Wynberg she was summarily dismissed without notice or payment. On the 1st May the defendant caused her to be placed under arrest, and for this she claimed damages estimated at £150. The plea admitted the contract, but denied that there was any agreement regarding plaintiff's passage back to England, and further set forth that while on board ship she conducted herself in a grossly rude, insolent, and improper manner; further, that she had refused to obey the lawful orders of the housekeeper, incited other servants to do the same, and claimed the right to go in and out of the defendant's house whenever she thought proper.

Miss E. J. Woodman deposed that she was engaged as a cook in London at a salary of £50 per annum, and it was a condition of the agreement that her passage was to be paid back if she remained in her situation for eighteen months. She arrived here by the Dunottar Castle, in company with two other servants who were engaged at the same time. On landing they went to Mr. Reid's office, and after waiting two hours were called into a room and asked by defendant to sign an agreement, but they refused, as it was different to the one they signed in England. They went to the defendant's house at Wynberg and the housekeeper (Miss Taylor) told them they were not to take off their things before seeing defendant. Witness had a long interview with him, but still declined to sign the agreement. She was not allowed to work, and as she was not employed she asked the defendant to pay her the eighteen months' wages which he refused to do. On Friday the defendant brought a policeman to the house, who searched her boxes and conducted her to the railway-station, whence she came to Cape Town, and took up her residence at the rooms of the Young Women's Christian Association, paying 3s. 6d. per day. For a short time she held a situation at the Dean's at a salary of £2 per month. She never behaved badly on board ship, and never refused to obey the orders of defendant or the housekeeper.

Cross-examined: She was never told in England that she would have to sign a new agreement here. On board the ship she never stopped on deck after the hours fixed by the defendant, neither did she behave indecently, nor declare that she would order goods as she thought proper. She did say that if the housekeeper came into the larder she would insult her. At that time both

Mr. and Mrs. Robinson were ill in bed. On the Friday she was ordered to leave the house, and on refusing, was conducted by a policeman to the station in a cab. She left the service of the Dean six weeks ago, and had tried to get another situation without avail.

Re-examined: She was required to leave the deck at six o'clock every evening, which she declined to do. She was always prepared to do her duty as cook.

Miss Annie Enever deposed that she entered into a similar contract to that made with the previous witness. On the voyage out the plaintiff conducted herself in a proper manner. She refused to sign the new contract, as one had already been signed in England. At Hawthorndene she heard the housekeeper tell the plaintiff she must not commence her work. She saw the policeman come to the house and search the plaintiff's boxes. He told plaintiff if she did not look sharp he would take her. Plaintiff told the housekeeper she was quite willing to do her duty as cook.

Miss Anne Old deposed that she was engaged in London as parlourmaid, and came out on the Dunottar Castle in company with the plaintiff, who behaved herself properly during the voyage. She heard the housekeeper tell plaintiff that, under orders from the defendant, she was not to commence work. She was present when the boxes were searched, and when the plaintiff and the policeman left the house her impression was that she was being conveyed to gaol. The defendant was willing and did make alterations in the agreement to suit the objections of the previous witness and herself.

Mrs. M C. Y. Lancaster deposed that she kept a registry-office It would be a difficult thing to find a person a situation as cook at more than £2 per month. Hotel cooks commanded higher wages.

For the defence was called Mr. J. B. Robinson, who deposed that he engaged the plaintiff in London, but in the agreement it was not stated that her passage would be paid back if she remained in her situation eighteen months. Two days after sailing from Dartmouth the plaintiff refused to leave the deck at proper hours. He told her she was a very insolent woman. On several occasions she misconducted herself with men and was the talk of the ship. Mrs. Robinson was quite upset in consequence. On arrival at Cape Town plaintiff objected to all the clauses of the new agreement and would not sign it. The matter of the agreement was again discussed at Wynberg, but no amicable conclusion was arrived at. She declined to take orders from the housekeeper, demanded to leave the house and return when she liked, and intimated that all the witness had to do was to pay the money. He offered to modify the terms of the agreement, but of no avail. The servants came down very late in the morning, and though he had a large staff it was half-past eight before anything was done by them. On the third day he got up and found the defendant cooking omelettes for a man to whom she had taken a fancy. He remonstrated with her, and after telling her she was a bad woman, and utterly demoralising the household, said if she did not leave the house he would send for the police. Finding her in a room drinking brandy and soda with a male friend, he sent for the police, and she went away with a policeman to the station with her luggage. He never gave orders for her boxes to be searched.

Cross-examined: Miss Taylor had gone home. He was actually positive that the plaintiff grossly misbehaved herself indiscriminately on board the steamer, with passengers and sailors. He did not know that he had the power to dismiss the plaintiff on arrival at Cape Town. The agreement he asked her to sign here was virtually similar to that signed in England. He never asked the girls to leave the deck at six p.m.; ten o'clock was the proper hour. The servants at Hawthorndene drank so much of his wine that he had to keep it locked up now. The parlourmaid and housemaid were instigated by the plaintiff to disobey orders. On the steamer she refused to retire to her cabin at proper hours, to take her food in a certain portion of the ship, and to take the orders of the housekeeper. The plaintiff distinctly understood, when in London, that she would be under the orders of Miss Tayler, who remained in his employ for a month or two. He never gave orders that the plaintiff was not to commence work because she would not sign the agreement. She positively would not work. The housekeeper had to do the cooking, as the family was starving. He sent for a policeman with the intention of giving the plaintiff in charge if she did not leave the house.

Mrs. E. R. Robinson deposed that during the voyage out she had occasion to speak to the plaintiff about not retiring below at proper hours, and her retort was that she would do as she liked. She rushed into witness' cabin and talked very loudly, refusing to leave when requested. She corroborated all that her husband had stated regarding what took place at Hawthorndene. The plaintiff did not work, and the housekeeper had to do the cooking.

Mr. J. A. Reid deposed that the plaintiff and two other girls came to his office, but they all refused to sign the contract he had drawn up. The contract, with the exception of the last clause regarding the withholding of half the wages to cover the passage-money, was virtually the same as that entered into in England.

Police-constable E. A. Manwell deposed that at the request of the defendant he went to the house with the intention of arresting the plaintiff

if she did not leave in ten minutes. He received no instructions from the defendant to search the boxes, but simply looked into one trunk. He accompanied her to the station in a cab; she was not a prisoner, and he simply drove down with her to oblige her. She was very friendly on the journey. He did not know what put it in his head to search the boxes; he had only been in the force about a week. The plaintiff handed her keys to him willingly.

By the Court: She was free to go by her own conveyance if she chose.

The defence being closed, the Court was addressed by Mr. Graham.

The Chief Justice, without calling upon Mr. Juta, said that the case had been very fairly and ably argued by Mr. Graham, but he had not succeeded in convincing the Court that this was a case in which the judgment should be for the plaintiff. He quite agreed with counsel that if the defendant had dismissed the plaintiff merely on the ground that she had refused to sign the agreement the dismissal would have been a wrong one, because the agreement submitted to her contained a clause which did not appear in the original contract entered into in England. At the same time he was satisfied that this clause was not the real difficulty she had before her; her real objection was to taking orders from the housekeeper as well as from Mrs. Robinson, and objecting to being debarred from leaving the house when she chose. In her cross-examination she admitted that she insisted upon leaving the house whenever she thought proper. While he did not think she was even bound to sign the fresh contract, he was also of opinion that she never intended to do so. She had told the defendant since she entered his service that she definitely refused to take orders from the housekeeper, and claimed the right to leave the premises whenever she liked. In his opinion, this was a claim she could not establish. If Mrs. Robinson could give orders to the plaintiff then the housekeeper, acting for her, could do the same. If the plaintiff refused to take orders from the housekeeper, he thought that was sufficient ground to justify her dismissal. Moreover, in his opinion, a domestic female servant in this country had no right to leave the premises of her employer whenever she deemed necessary. In his evidence, the defendant stated that he three times sent for the defendant, but she refused to wait upon him. This was a distinct disobedience of orders. It might be looked upon as a trivial matter, but taken in connection with her previous statement, that she would take no orders from the housekeeper, he considered that this was a disobedience of lawful orders which justified the defendant in dismissing her. Much had been made of the circumstance that this girl was an unprotected female, who had just arrived in the Colony, and no doubt there was some truth in that, but at the same time she had the remedy in her own hands. Mr. Robertson said if she would only agree to the other terms of the agreement he would not insist upon the fulfilment of the last clause. She refused to do this, and might have had a comfortable home, but through her own act she brought upon herself her dismissal. Under all the circumstances, there was no other course open to the Court than to give judgment for the defendant with costs.

Mr. Justice Buchanan concurred.

The Chief Justice said as to the charge of false imprisonment, he did not believe that this woman ever was under arrest. The policeman said he would have taken her into custody if she had refused to leave the premises. She went with her own consent to the railway-station in company with the constable. As to the searching of the box, he considered that the constable had somewhat exceeded his duty, but he was quite satisfied that the defendant did not authorise him to take that step.

[Plaintiff's Attorney, H. P. du Preez; Defendant's Attorneys, Messrs. Reid and Nephew.]

REHABILITATIONS.

The following applicants received their rehabilitation: Charles W. Smart, Marthinus Beyers, G. J. van Zyl, and P. M. Duckitt.

GENERAL MOTIONS.

HEINEMANN V. HEINEMANN.

Mr. Juta moved for an order making absolute the rule *nisi* for the dissolution of marriage subsisting between the parties, by reason of the respondent's failure to obey the order of Court for restitution of conjugal rights.

The order was granted.

In re THE ALBERT DISTRICT GOLD-MINING COMPANY.

Mr. Searle moved for an order in terms of the official liquidator's report, presented to the Court on the 6th August last, and for direction as to the allowance to be made to him for his services.

The Court appointed Mr. E. Hoffa in the room of Mr. Michau and directed that the latter should receive five per cent. upon his collections.

BRASCH V. BRASCH.

Mr. Juta applied for an order making absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties, by reason of the respondent's failure to obey the order of Court for restitution of conjugal rights.

The order was granted, the wife to have the custody of the child.

IN THE ESTATE OF THE LATE WILLEM J VAN ZYL.

Mr. Juta moved for an order giving authority to the executor dative to sell certain half-share in a portion of the farm Zandvliet, situated in the district of Robertson, in which three minor heirs in the said estate are interested. —Granted.

ROSS V. ROSS.

Mr. Giddy moved for an order making absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action against his wife for divorce.—Granted.

In re THE CAPE STOCK-FARMING COMPANY (LIMITED).

Mr. Schreiner made application for the rescinding of the order granted by the Court on the 31st August last, placing the said company under the operation of the Winding up Act of 1868, by reason that certain facts and circumstances, necessary and material for the consideration of the Court, were not disclosed on the *ex parte* application.

Sir T. Upington, on behalf of the respondents, applied for a postponement, which, after argument, was agreed to, the matter to come on again on Tuesday week. In the meantime no acts of administration were to be undertaken by the liquidator, nor was he to part with any of the Company's assets.

EATON V. EATON.

Mr. Tredgold moved for an order appointing counsel to act for the plaintiff at the trial of the said cause, which has been removed to the Queen's Town Circuit Court.

The Court granted the application and appointed Mr. V. Sampson counsel.

BURN V. BURN.

Mr. Tredgold moved for an order removing the said cause for trial at the Circuit Court to be held at Oudtshoorn on the 29th instant.—Granted.

PETITION OF MAGDALENA J. GEDULD.

Mr. Tredgold moved for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.—Granted.

IN THE ESTATE OF THE LATE ISAAC JUKKIE.

Mr. Joubert moved for an order making absolute the rule *nisi* for the payment to Candassa Adams and others the amount of inheritance lodged with the Master out of the said estate to the credit of the children of Hessie Adjam, all of whom are dead leaving no issue.—Granted.

IN THE ESTATE OF THE LATE HERMINA M. OVERBEEK.

Mr. Juta moved for an order making absolute the rule *nisi* for the payment in aid of the support of Albertina Overbeek and her child the inheritance devolving upon Gerhard E. Overbeek and his wife, the said Albertina Overbeek, as heirs *ab intestato* in the estate.—Granted.

PETITION OF MARIA J. WIDDOWSON.

Mr. Graham, on behalf of the petitioner, moved for a rule *nisi* calling upon her husband, John T. Widdowson, to show cause why she should not be admitted to sue him *in forma pauperis* in an action for debt under the terms of a deed of separation.—Granted.

SUPREME COURT.

MONDAY, SEPTEMBER 14.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

LANGFORD V. MARAIS.

Poundmaster — Divisional Council — Civil Commissioner—Ordinance No. 16 of 1847, sec. 18—Damages for alleged contravention—Exception to summons—Act 1 of 1857 and Act 40 of 1889, sec. 216—Appeal.

The Acting Attorney-General (Mr. Searle) appeared for the appellant, and Mr. Schreiner for the respondent.

This was an appeal from the High Court of Griqualand West, and raised a point of some im-

portance to Divisional Councils and poundmasters, namely, whether section 18 of Ordinance 16 of 1847 had been repealed by Act 40 of 1889.

The facts of the case are as follows: The plaintiff (present respondent) sued the defendant before the Resident Magistrate at Kimberley for damages sustained by reason of his neglecting to send certain notices to the Civil Commissioner, as it was alleged he was required to do by section 18, Ordinance 16 of 1847. The defendant excepted to the summons on the ground that the section in question had been repealed by Act 1 of 1857. The exception was sustained by the Magistrate, and the plaintiff appealed to the High Court. The latter Court held that the exception, as based on the Act of 1857, was technically bad, as that Act had been repealed by Act 40 of 1889; but that section 5 of the Act of 1857 had been substantially re-enacted by section 216 of the latter Act. The Court also held that this section did not repeal section 18 of the Pound Ordinance, requiring the notices to be sent to the Civil Commissioner. It merely enacted that the method of publication should be as directed by the Divisional Council, anything in section 19 of the Pound Ordinance notwithstanding, and that the effect of the two sections taken together seemed to be that the notices should still be forwarded by the poundmaster as directed by the Pound Ordinance, and should then be published in such manner as the Divisional Council should direct. The case was therefore remitted to be heard on its merits, leaving the plaintiff to prove that he had sustained damage by reason of the alleged neglect of the defendant. From this decision the respondent (present appellant) now appealed.

Mr. Searle, in support of the appeal, contended that it was clearly the intention of the Legislature to repeal section 18 of Ordinance 16 of 1847 by section 216 of Act 40 of 1889.

Mr. Justice Smith: Are general instructions issued by Divisional Councils for the direction of poundmasters?

Mr. Searle: There is nothing on the record to show that such instructions have been issued, but the Court would assume that such instructions have been given, and that poundmasters acting upon them have done their duty.

Mr. Schreiner: There is nothing in Act 40 of 1889 to show that poundmasters are freed from their obligation to send notices to the Civil Commissioner. By the Act of 1889 the Civil Commissioner retains close connection with the Divisional Council, of which he was to be *ex officio* chairman. The only difference between the earlier and later Acts is that whereas in the former notices were to be sent in a form approved by the secretary to Government, in the latter they were to be in a form approved by the Divisional Council. Section 18, Ordinance 16 of 1847, is the public's charter, and it was never intended by the Legislature to repeal it by section 216 of Act 40 of 1889.

The Chief Justice, in giving judgment, said that the summons in the case claimed damages sustained by the plaintiff by reason of the defendant contravening section 18 of Ordinance 16 of 1847, in that he did wrongfully and unlawfully keep in the pound certain mules without issuing the advertisement required by the section. There was no allegation in the summons that the Divisional Council had failed to give directions to the poundmaster in terms of section 216 of the Act of 1889. If there had been such an allegation the Court might have been induced to inquire what the state of things was supposing the Divisional Council failed to make any regulations whatever. It was alleged, though not proved, that there were actually regulations in force, but of what nature did not appear, and of course the Court must dismiss that from consideration. Under section 213 of the Act of 1889 the general management and control of every pound, other than pounds in municipalities or corporate towns, was vested and conferred upon the Council of the division in which such pound was situated. Clearly, therefore, there was an intention to divest the Government and the Civil Commissioner, as such, of all powers which they formerly had under previous Acts. Now, the question to be decided was whether the 18th section of the Ordinance of 1847 was still in force, or was virtually repealed by section 216 of the Act of 1889. In his opinion the two sections were wholly inconsistent with each other. The 18th section required that an advertisement should be prepared and forwarded to the Civil Commissioner of the division in order for the publication thereof, as in the next succeeding section provided. The next succeeding section provided for a certain form of publication, but that was entirely repealed by section 216 of the Act of 1889. The publication was therefore entirely dispensed with by the subsequent Act. By the Act of 1889 the advertisements were to be published, and the form of advertisement approved by the Divisional Council. In his opinion the Divisional Council of every division was entitled to direct the form of the advertisement, and was not bound by section 18 of 1847. Under those circumstances he thought the exception taken in the Magistrate's Court was a right one, and the appeal must be allowed with costs.

Mr. Justice Smith was of the same opinion, and said that clearly divisional pounds were under the control of the Divisional Councils.

Mr. Justice Buchanan also concurred.

[Appellants' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Respondents' Attorneys, Messrs. van Zyl & Buissinne.]

REGINA V. BLUMENTHAL.

Diamond Trade Act No. 48 of 1882—Contravention—Conviction—Evidence of trap—Credibility—Appeal.

Sir T. Upington, Q.C., for the appellant; Mr. Giddy for the Crown.

This was an appeal from a sentence passed by the Special Court at Kimberley, under the Diamond Trade Act, No. 48 of 1882, whereby the appellant was convicted and sentenced to seven years' imprisonment.

Counsel said he must admit that the appeal was based on fact, but as pointed out in the case of "Hoole's Trustees v. Hudson, Vreede & Co." (1 Appeal Cases, 142), the Appeal Court might overrule the judgment of the Court below on a question of fact, under certain circumstances. The case was a somewhat peculiar one. A woman was employed by the Detective Department for the purpose of trapping an illicit diamond dealer, not being Blumenthal. For that purpose she sent for a man named Green, who appeared to have been a go-between for the individual the woman wished to get hold of. Green came to the woman's house, and wished her to go with him to the intended princpal. She refused to go, because detectives were in the house, and she wished to get the man to come to her house. Then the man Green went to the intended principal, but returned with the information that he was not at home, but that he knew of another man who would buy. Then occurred a most remarkable thing in the evidence, that he (counsel) was not able to fathom. While Green was there, according to the evidence of the detective (Brink) and the woman, she communicated with Brink, and asked if she might go, though there was nothing in the world to show that Green was not there the whole time, and heard all. At any rate, she did go out with Green to the house of Blumenthal, where a transaction took place. Blumenthal said that he was not concerned in the transaction at all, but that Green came there and asked to be allowed to use a room in the house for the purpose of a transaction with the woman. He refused at first, but afterwards allowed Green to use the room. The woman said positively that the person who bought the diamonds was Blumenthal, but Green contradicted her, and said that Blumenthal had nothing to do with it. The diamonds were found in a common passage between the house of Blumenthal and that of a person employed at the De Beer's Mine.

The Chief Justice:—Then it is a mere question whether the Court believes the evidence of the woman, or of Green?

Sir Thomas Upington:—And whether there was such a mistake in dealing with the credibility of the witnesses as would justify the Court in reversing the decision arrived at.

The Chief Justice:—I have read over the evidence, and as far as I can judge, the woman's evidence is corroborated in every particular by the detectives and all the circumstances; and even Green himself admits that Blumenthal connived at the sale.

The Chief Justice said he was satisfied that the appeal could not be allowed. The evidence clearly showed that the appellant was guilty of the offence. It was not only a question of credibility, but also of probability, and all the probabilities of the case were in favour of the evidence given by the prosecution. The appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, Gus Trollip; Attorneys for the Crown, Messrs. Reid & Nephew]

STANDARD BANK V. WYLIE.

Mr. Schreiner moved for final adjudication of the respondent's estate.

Sir T. Upington appeared to oppose, and read respondent's affidavit, dated at Kimberley on September 11, in which it was stated that he owed the bank £420, for which he had pledged certain shares, valued by a broker at £110 together with certain Waterval shares the value of which was not ascertainable. This sum, deducted from the £450 stated by the bank to be the debt with interest, reduced his indebtedness to £340. Two months ago he wrote to his mother in Scotland, requesting her to send him £300 for the purpose of paying all his creditors except the bank, and promising not to use the money except for that purpose. The sum of £297 was cabled to him through the Standard Bank instead of De Beer's, as he requested, and the bank had stuck to the money. If the bank should be held legally entitled to appropriate the £297, it was not entitled to apply for sequestration of the defendant's estate. His other creditors were pressing him, but if the bank kept the £297 he could not pay them at once.

The Chief Justice said it was clear the respondent was not able to pay his debts, and the only question was as to whether it was for the benefit of the creditors that the estate should be sequestrated. He thought it was, for if it were not the bank would stick to the £297. Final adjudication would therefore be granted, costs to come out of the estate.

REHABILITATION.

On motion from the bar, the rehabilitation of the following insolvent was granted: L. J. C. Botha.

MEIRING V. GRUNDLINGH'S EXECUTOR.

Mr. Juta for the applicant; Mr. Searle for respondent.

Mr. Juta moved for an order calling upon the respondent to show cause why he should not lodge with the Resident Magistrate of Oudtshoorn a full account of his administration of the estate, and why he should not be held to have forfeited his executor's fees by reason of his delay.

The Court ordered the accounts to be filed within six weeks from this date, respondent to pay the costs of the present application.

THE UNION BANK, IN LIQUIDATION V. WATSON'S EXECUTORS.

Company—Bank in liquidation—Deceased shareholder—Contributories—Liability of executors — Payment of calls *de bonis propriis* — *Condictio indebiti* — Ordinance No. 104, secs. 30 and 32—Taylor v. Taylor (L.R. 10, Eq. 477) discussed.

On the 12th March last the Court granted a rule *nisi* calling upon the executors to show cause why they should not be ordered to pay *de bonis propriis* the amounts which they had paid the heirs. To-day the Court made the rule absolute, and delivered the following judgments:

The Chief Justice said: At the date of the order for the winding up of the Union Bank the "Estate of Thomas Watson (care of W. A. Currey, Cape Town)" was included in the list of shareholders of the bank in respect of fifty shares. W. A. Currey is the secretary of the General Estate and Orphan Chamber, and one of the respondents. In framing a list of contributories the applicants, as official liquidators, adopted this list, and it is not denied by the respondents that they, in their capacity as executors of Watson's estate, have been duly placed upon the list of contributories. They have acknowledged the liability of the estate, and, consequently, their liability as executors, by paying to the applicants such assets of the estate as came into their hands after the date of the winding up. The amount of the call, however, is far in excess of the sum paid over, and, in answer to the applicants' demand for the balance of the call the respondents say that they have no further assets of the estate in their possession. They do not deny that they have paid out to the heirs of Watson much more than would suffice to meet the call, and the question to be determined is whether the answer is sufficient; in other words, whether the respondents are relieved from paying the calls by the fact that they have distributed the assets of the estate not only among the creditors, but among the heirs of the deceased. If they are not so relieved they must pay the calls *de bonis propriis*; if they are so relieved, their liability must be confined to such assets of the estate as may still come into their hands. The Union Bank was a joint-stock company, with unlimited liability, and the 7th article of its deed of settlement recognises the right of an executor to hold, in that capacity, the shares of a deceased person whose estate he has been appointed to administer. The respondents in the exercise of that right continued, in their capacity as executors, to hold Watson's fifty shares; they paid calls on them, and they received the dividends from time to time awarded on these shares. The partnership which had been commenced in Watson's lifetime continued after his death, the executors being entitled, in their capacity as such, to all the benefits accruing from the continuation of such partnership. Being entitled to the benefits they were also liable to the burthens arising out of their position as shareholders. The creditors of the bank could make no claim upon the estate without first excussing the bank, and so long as the bank satisfied its liabilities there would be no occasion for creditors to excuss the bank. The list of shareholders was duly registered, and creditors dealing with the bank and finding that the estate administered by the respondents still retained the shares, would be justified in assuming that the respondents were properly retaining the shares as part of the estate. They certainly would not be induced to file their claims against the estate. I fail to see, therefore, what bearing the 30th and 32nd sections of Ordinance 104, which are so much relied upon on behalf of the respondents, have upon the present case. It is quite true that under the 30th section they have given notice to creditors of the deceased to lodge their claims, and that under the 32nd section they have paid all claims duly lodged with them. These are not the payments which are now questioned. They have also paid the heirs with the knowledge of a continuing liability towards the creditors of the bank. That knowledge did not prevent them from succeeding in their action against some of the heirs to recover back a proportionate share of the inheritances which had been paid to them. They knew that the shares still belonged to the estate, but it was doubtful whether a call would ever be made in respect of these shares, and therefore it could not be said

that they knowingly paid the heirs what was not owing to them. Accordingly the Court, upon the authority of Voet (12, 6, 6), held that they could sue the heirs by means of the *condictio indebiti*. But it does not follow that by our law—whatever the rule of the English law may be—the executors are relieved from responsibility towards the creditors of the bank. The executors would have been justified in refusing to pay out the inheritances until the partnership of the estate with the other shareholders of the bank had been put an end to, and the liability, if any, arising out of it had been ascertained. They have taken the risk upon themselves of paying the heirs, and what they have so paid they may recover back, but are they to be relieved from their personal responsibility for any deficiency (not exceeding the assets available for distribution among the heirs) which they cannot recover back from the heirs? In my opinion the responsibility which formerly attached to the heirs now attaches to the executor who administers and manages the estate on behalf of the heirs. Just as the heir who, after adiating with benefit of inventory, paid out legacies before he had satisfied the debts would formerly have been liable *de bonis propriis* to the creditors, so the executor who pays out the inheritances without providing for any continuing liability of the estate incurs a personal liability to the creditors. Such a continuing liability existed so long as Watson's executors, taking the place of the heirs as the representatives of his *persona*, remained the holders of the shares. In the cases of "Brink v. Esterhuyzen" (1 Menzies, 478), and "Kotzé v. Mostert" (Buchanan, 1869, p. 199), which have been relied upon by the respondents' counsel, there was no continuing liability of the estate to the knowledge of the executors, nor is it quite clear that in either case the executors had paid any portion of the assets to the heirs of the deceased. As to the contention that an executor being merely a mandatory for the heirs does not render himself personally responsible except when he has contracted in his own name, a similar argument was advanced but overruled in this Court in the case of "Norden v. Brink" (3 Menzies, 403). As between the executors and the heirs he acts in a certain sense as their mandatory, but towards the rest of the world he occupies the position of legal representative of the deceased, with all the rights and obligations attaching to that position. One of these obligations is to provide, to the extent of assets in his hands, for payment of all continuing liabilities of the estate, and if he places it out of his own power to fulfil this obligation in his representative capacity, he must be held personally liable for the consequences. I have not thus far referred to the law of England, but I am not satisfied that it differs from ours upon the question now under consideration. It would appear that the *condictio indebiti* is allowed by our law to executors against heirs, under circumstances which would preclude an English executor from recovering back moneys paid to legatees, but this is mainly owing to the difference in the relative legal position of our heirs and English legatees. As regards the liability of executors towards creditors of the estate, the difference does not appear to be so great. In the case of "Taylor v. Taylor" (10 L.R. Eq., 477), the question was whether the executors of a deceased shareholder in a banking company which was wound up after the testator's death and the distribution of his assets were liable to pay, in satisfaction of the calls, a sum which they had already paid to a legatee under the testator's will. Counsel for the executors argued, as was done in this case, that the liability was only contingent, inasmuch as the bank was a going concern at the time of the testator's death, and that an executor cannot be called upon to keep his testator's assets for the purpose of paying a contingent debt; but the Master of the Rolls held that the executors had committed a breach of trust in paying the legacy without providing for the liability attaching to the testator's estate at the time of his death in respect of the shares and were liable to pay the calls. That case was decided in 1870, and therefore after the passing of Act 22 and 23 Vict., c. 35, the 29th section of which contains provisions in some respects similar to the 32nd section of our Ordinance. The case does not appear to have been since overruled, and is referred to in a footnote to the latest edition of Lindley's Company Law (p. 818), as an authority for the view "that executors of deceased shareholders in going companies cannot safely pay legacies without providing for future calls." The case was also cited without disapproval by Jessel, M.R., in the course of the argument in "Jervis v. Woolferstan" (L.R. 18, Eq. 18). In the latter case there was no question as to the liability of executors in respect of shares standing in the name of the testator. The shares appear to have been transferred by the testator during his lifetime to trustees of his marriage settlement in trust for his wife for life, with remainder to his children. After the residuary legatees had been paid a call was made in respect of the shares, and the trustees having paid the calls were held to be entitled, as creditors of the estate, to a refund from the residuary legatees. "I take it for granted," said the Master of the Rolls, "that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, and I have already held that the plaintiff and his co-trustee are unpaid creditors." This was all that it was necessary to decide, but he then proceeds to consider the question whether the fact of the plaintiff's also being

executor disentitled him to a refund, and the conclusion at which he arrives is that it did not, on the ground that the executor had no notice of a claim, but only of a possible liability. The possibility was not only that the company might fail, but that the remainder men might disclaim, that there might thus be a resulting trust for the estate, and that the estate might become liable to indemnify the trustees, and the executors were held not to be guilty of negligence in not providing for this remote contingency. It by no means follows that the Master of the Rolls would have held the executors free from personal responsibility if the shares had remained in the name of the testator, and the question had arisen whether the executor should pay the call *de bonis propriis*. In the present case there certainly was negligence on the part of the respondents in paying the heirs, although the negligence was not so gross as to deprive them of the right to a refund from the heirs themselves. The payment having been made in ignorance of the fact that the bank would fail, our law implied a contract on the part of those to whom it was made to refund to those from whom it was received (Digest 44, 7, 5, section 3). But this ignorance cannot avail the respondents when sued by the liquidators acting on behalf of the creditors of the bank. There was a legal duty upon the executors to protect the interests of the creditors before paying the heirs, who were really, although not nominally, partners in the bank, and reaped their full benefits from it as a going concern. For their want of ordinary care and diligence in the performance of this duty the respondents are personally liable, and the rule must therefore be made absolute, to the extent of any deficiency of assets in their hands, with costs.

Mr. Justice Buchanan: These applications raise questions of considerable importance to executors, relative to their duties in the administration of estates of deceased persons. With regard to the English decisions which have been cited, useful as such authorities are when they afford an analogy, it must be remembered that under our law an executor's position differs very materially from that of an English executor. Our system deals, I think, far more equitably than the English with persons occupying fiduciary positions. With us an executor does not as such undertake any personal liability for the obligations of the deceased person whose estate he administers. The Privy Council, in the appeal from this Court in "De Montmort v. Broers" (erroneously reported as "De Montfort v. Broers"), 18 App. Cas., 155, and again in "Farnum v. Administrator-General of British Guiana" (14 App. Cas., 658), laid it down on the authority of "Van der Keessel" (Th. 823). that according to Roman-Dutch law the executors of a testament were in reality procurators, and that their powers in relation to the estate falling to the testator's heirs were merely those of management. In the recent case of "Fischer v. the Liquidators of the Union Bank" (8 Juta, 58), the Chief Justice expressed the opinion that this was a correct statement of the law as it existed in Holland, but that in this colony it had been considerably modified by our local Ordinance No. 104. His lordship said: "If the Privy Council intended to lay down that by the law of this colony executors are, in relation to creditors, mere managers or procurators, their view would be clearly in conflict with the Ordinance, which, indeed, appears not to have been quoted before their lordships." From the rest of the judgment I gather that this refers to the fact that under the Statute executors are vested in their executory capacity with the estate itself; but there is nothing in the case from which I have cited, or in the Ordinance, which, apart from any question of due administration, infers that any personal liability for the debts of the deceased is cast upon an executor. True, the executor, rather than the heir or beneficiary, comes nearer to the position of the *heres* of the Roman law, but as was pointed out recently, he is such *heres*, protected by the privilege of the benefit of inventory. And again, unlike the English practice, with us the administration of estates is a business, the pecuniary remuneration for which is in some instances fixed by statute and in others left to the discretion of the Master of the Court, and upon the amount so earned a duty is payable to the public revenue. In the cases before us the names of the deceased are upon the list of shareholders of the banks, and on the list of contributories the estates of such deceased shareholders appear, the executors not being mentioned. The call has been made upon them in their fiduciary capacity only; and there is nothing in the Winding-up Act which imposes any personal liability on an executor. Moreover, the trust deed of the Union Bank more particularly, instead of seeking to impose any such liability, recognises the right of an executor to hold, in that capacity, the shares of a deceased person. Under these circumstances the application to issue execution against the executors *de bonis propriis* can, I think, only be based on some default in administration. The default alleged on both these applications is the paying out of the residuary estate while there remained shares in going concerns registered in the names of the testators, upon which shares there was a contingent liability for calls. Now our statutory provisions for the guidance of executors in their administration are not very complete or exhaustive. By the 28th section of Ordinance No. 104, executors are required, upon appointment, forthwith to make an inventory of the estate, and to transmit the same to the Master. Upon entering into the administration,

the 30th section requires the executor, by public notice, to call upon all persons interested to lodge their claims with him; and the 31st section suspends execution of any judgments against the deceased or his estate for a period of six months, except with the special leave of the Court. Next comes the 32nd section, which was cited as specially protecting the respondents. It enacts that upon the expiration of the period fixed by the notice calling in claims, the executor shall forthwith proceed to rank, according to their legal order of preference, all such debts and claims as may have been lodged with him, "or of the existence of which they shall have knowledge," and shall discharge the same so soon as necessary funds are realised. In the event of an insufficiency of assets, the executor is liable to pay any person of the existence of whose claim he was aware who has been prejudiced by a payment to other creditors who were not entitled to preference. There is a proviso, however, protecting creditors who have lodged their claims, and who have been paid against claims by creditors who had not so lodged their claims before the date of payment. The section concludes with a further proviso that a creditor who has not lodged his claim in due time shall have no claim "against any executor or executors in respect of any such distribution as aforesaid of the funds of any such estate made by him or them after the expiry of such period as aforesaid (*i.e.*, the date fixed for lodging claims), and before the claim of such person shall have been made known to such executors." On this clause it was argued for the respondents that as no claim was filed, nor indeed could be filed, by the liquidators at the time of the distribution of the assets the executors were now protected. But since that contention was set up it has been repeatedly pointed out that this proviso refers only to payments to creditors and not to a distribution of the residue of the estate among beneficiaries. And this disposes of the case of "Kotzé v. Widow Mostert" (Buch., S.C. Rep., 1869, p. 199), which was also strongly relied upon at the Bar, for in that case the dispute was between creditors who had and who had not sent in their claims to the executors. The proviso in the 32nd section being thus disposed of, this section itself tells rather against than for the respondents if we take the view that the fact that there were shares in the estate was notice to the executor of the possible liability attaching thereon. The English cases show that executors of deceased shareholders in going companies in England pay legacies at their own risk should any future calls be made. "Taylor v. Taylor" (L.R. 10, Eq. 477) is particularly in point, as in that case the shares were still in the name of the deceased, and had never been transferred to the executor, and he could not on that ground have been held personally liable. The judgment, which is reported in a very few lines, states that the decision was based on the authority of "Knatchbull v. Fearnhead" (3 My. and Cr., 122), where the Lord Chancellor laid down that where an executor passes his accounts through the Court—I presume in an administration suit—he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if the executor pays the residue of the estate without passing his accounts in court, he does so at his own risk. There is no corresponding proceeding known to our practice whereby an executor can obtain a ratification of his administration, though in insolvency the trustee's account becomes *res judicata* upon confirmation by the Court. Under the Insolvent Ordinance a trustee has his account confirmed before paying out the funds in hand; whereas the 33rd section of Ordinance No. 104 requires the executor, so soon as the estate has been fully administered and distributed, to file a full and true account with the Master. This mere lodging of accounts has never been held to preclude an inquiry into the administration of the estate. Although, therefore, the principle upon which the decision in "Knatchbull v. Fearnhead" is founded cannot be applied under our law, it remains for consideration whether a rule similar to that laid down in "Taylor v. Taylor" does not hold good with us. After mature consideration I have come to the conclusion that it does. Under the civil law the heir stepped into the position of and continued the *persona* of the deceased, and was legally bound by all the debts, though he might obtain the protection of the several *beneficia*, such as the *beneficium separationis*, the *beneficium abstinendi*, and the *beneficium inventarii*, by which he might limit his liability to the value of the property he acquired as heir. Our modern executor succeeded to this liability. Moreover the 32nd section of the Ordinance in express terms imposes on the executor the duty of paying off and discharging the debts of the deceased as soon as the funds necessary for that purpose shall have been realised out of the estate; and the 29th section makes an executor or other person who, without lodging with the Master an inventory of the estate, unduly administers an estate personally liable to pay the legatees as well as the creditors of the deceased, although the estate be insufficient for the full payment thereof, unless he proves what the estate really amounted to and that his administration was not fraudulent. The payment of debts is thus a duty imposed on an executor; and the same principle which requires a man to be just before he is generous, imposes on an executor the duty of satisfying the liabilities of the deceased before he acts upon the direction of the testator to give away the assets to legatees and other beneficiaries. Ignorance of the

existence of liabilities may protect an executor who has taken due precautions before making a *bona-fide* distribution of the assets, but in the cases before us I think the facts are not such as would entitle the executors to be exonerated on this ground. No doubt in one sense the liability was contingent, in that it was not certain at the testator's death that any call would ever be made, but the shares always carried the liability attaching to them. As long as the shares were in the estate that risk continued. If while this uncertainty and doubt lasted the executors parted with the residue, in my opinion they did not act with sufficient prudence. This rule appears to me to be founded on sound reason, and if we once accept the principle there are no grounds why it should not be applied to all the cases now before us.

[Attorneys for the Bank, Messrs. Fairbridge & Arderne; Attorneys for the Respondents, Messrs. Reid & Nephew, Messrs. van Zyl & Bussinne, and Gus Trollip.]

CAPE OF GOOD HOPE BANK, IN LIQUIDATION V. VAN LIER'S EXECUTORS.

A rule *nisi* was also granted in this case on the 17th March last, and was made absolute to-day.

The Chief Justice, in giving judgment, said: This case differs from that of the "Liquidators of the Union Bank v. Executors of Watson" in two respects—that is, the company in which the testator held shares was limited, and he had himself directed that the shares should not be sold but remain under the administration of the respondents for the purpose of paying the dividends to the Institute for Indigent Ladies. But although the liability of the bank was limited the shareholders remained liable, at the date of the winding-up order, to a call of £30 for each share. It is in respect of this call that the respondents, in their capacity as executors, were placed upon the list of contributories. As to the direction that the shares should not be sold, the respondents accepted the office of executors with the full knowledge of this direction and of the difficulties which it might entail in the course of their administration. It is unnecessary at this stage to inquire whether, as between the heirs under the will and the legatees of the shares, the former or the latter were primarily liable for the unpaid portion of the shares. The analogous question as to whether the heirs or the legatees of mortgaged property should redeem the mortgage was discussed in the case of "Rathfelder v. Rathfelder" (Buch. Reports, 1874), and the authorities are collected in the report of that case. As to the creditors of the bank, they were entitled to regard the executors as liable for the debts upon failure of the bank so long as the shares formed portion of the estate. Here also if the executors chose to pay out the heirs and legatees they did so at their own risk. They could not, it is true, consistently with the provisions of the will sell the shares, but they might have refused to distribute the assets amongst the heirs unless the latter would consent to the deduction of a sufficient sum to meet the further possible calls of £30 per share. The question might then have been decided whether the heirs or the legatees should indemnify the executors for any loss that might be entailed on them through continuing to hold the shares. But this is a question which does not concern the applicants as liquidators of the bank. They were entitled to be paid out of the assets of the estate which were in existence during the time when the estate was in the partnership in preference to the heirs, who were only entitled to the residue after payment of all debts. The respondents may have their recourse over against the heirs or against the legatees of the shares—and this recourse will, of course, be reserved to them—but the rule *nisi* calling upon them to show cause why they shall not pay the calls *de bonis propriis* must be made absolute with costs.

[Attorneys for the Bank, Messrs. Reid & Nephew; Attorneys for the respondents, Messrs. Wessels & Standen.]

UNION BANK V. HOFMEYR'S EXECUTRIX.

Mr. Schreiner for the applicants; Sir T. Upington, Q.C., for the respondent.

Mr. Schreiner moved that the rule *nisi*, granted by the Court on the 28th February (*ante* p. 64), calling upon the respondent to show cause why she should not pay, *de bonis propriis*, the calls in respect of thirty shares in the Union Bank should not be made absolute.

Sir T. Upington shortly re-stated the circumstances of the case, which he said had already been fully argued. He referred the Court to "Horne and Leodolff" (1 Menzies, 408) and "Underwood and Hatton" (5 Beavan, 86).

The Chief Justice said that with regard to this case he thought if there were any difference between it and the two which had just been disposed of the difference was rather against the respondent, because three-fourths of the amount of the inheritances she had paid herself, whilst in the other cases the inheritances had been paid to others. It would have been difficult for the respondent to avoid being held liable for the three-fourths, but on the principle on which the other two cases had been disposed of the rule in the present case must be made absolute, with costs.

[Attorneys for the Bank, Messrs. Fairbridge & Arderne; Attorney for the Respondent, Paul de Villiers.]

IN RE UNION BANK, IN LIQUIDATION V. WATSON'S HEIRS.

Mr. Schreiner mentioned the rule in the above case, and asked that the costs in that application might be included in the costs against the executors of Watson.

The Chief Justice said the order would be in regard to the three cases that the rule would be made absolute with costs, and in the one case, that of the liquidators against the heirs of Watson, the rule would be discharged with costs.

PETITION OF ARTHUR JAMES MCLEOD.

Articled clerk—Incorporated Law Society—Act 27 of 1883, sec. 14—Non-compliance with terms of section.

Mr. Molteno appeared for the petitioner, and Mr. Juta for the Incorporated Law Society.

This was an application praying the Court to authorise the Law Society to receive petitioner's articles and allow them to operate from the date of filing the same. It appeared from the petition that on the 26th July, 1890, the petitioner entered into articles of clerkship with Mr. E. J. Bishop Gardner, an attorney practising at Barkly West. That the agreement was duly stamped and filed with the Registrar of the High Court of Griqualand West, but that the petitioner had omitted to file a copy of his articles with the Law Society within three months of the execution of the same in terms of Act 27 of 1883, section 14. An application was subsequently made to the Law Society, but that body refused to receive the articles without an order of Court. The argument was heard on the 20th August, and the matter stood over until to-day, the Law Society in the meantime virtually consenting to the granting of the application.

The Chief Justice said that in regard to this application he was satisfied that unless the Law Society consented to it it could not be granted, but seeing that the consent of the Law Society had been obtained, the Court would grant the application. The case was not to be regarded as a precedent, however, because every case must be considered by the Law Society before registration could be dispensed with.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, SEPTEMBER 15.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

IN RE DANIEL VICTOR KANNEMEYER.

On the application of Mr. Schreiner, Mr. Daniel Victor Kannemeyer was admitted to practise as an attorney and notary public, The oaths to be taken before the Resident Magistrate of Burghersdorp.

IN THE INSOLVENT ESTATE OF EDWIN DODD.

On the motion of Mr. Molteno, Mr. W. C. Osmond was appointed trustee in the above estate.

THE PETITION OF ALFRED BEVERN.

Land — Option of purchase — Neglect to exercise same—Sale—Refusal of Registrar of Deeds to pass transfer—Rule *nisi*.

Mr. Schreiner appeared for the petitioner.

The petition set forth that by a deed of transfer dated 1st November, 1889, the petitioner acquired from one James Edward Mears a certain piece of land situate at Sea Point, subject to the following condition: That should the petitioner wish at any time to sell the said ground and any buildings which might have been erected thereon while the said J. E. Mears remained the proprietor of the remainder of the said property, then the said J. E. Mears should have the refusal of the purchase thereof at the cost price of the said ground and buildings as declared by petitioner on the 1st March, 1890, and in addition thereto one half of the additional price for which the petitioner should be able to sell the same to parties other than the said J. E. Mears. On the 24th July, 1890, the petitioner offered the said landed property to G. W. Steytler, who is the general agent in this colony of Mears, and again on the 15th August, 1890, the petitioner, through Mr. Attorney Moore, offered the property to Mr. Steytler, as Mears's agent, for £3,125. At the time of the latter offer it was intimated to Mr. Steytler that unless a definite reply was received by the 18th August the petitioner would assume that Mears declined to purchase the property. On the 16th August, 1890, Mr. Steytler cabled to his principal in Europe but no reply was received. The petitioner alleged that he had performed in every respect the obligations imposed upon him,

and that Mears had failed and refused to exercise the option of purchase, although every opportunity was afforded him of doing so. The petitioner lately sold the property, but the Registrar of Deeds requires the consent of Mears or of his agent to transfer being passed to the purchasers. Mr. Steytler refuses to give his consent in the absence of instructions from his principal without an order of Court. The petitioner prayed that the Court might be pleased to grant an order directing Mr. Steytler, in his capacity as agent of Mears, to sign whatever document might be necessary or required by the Registrar of Deeds in order to enable the petitioner to give transfer to the purchasers in due and customary form.

The Court granted a rule *nisi*, returnable on the 22nd inst., calling upon Mr. Steytler, as general agent of Mears, to show cause why the Registrar of Deeds should not be authorised to pass transfer of the property to the purchasers.

SUPREME COURT.

(IN CHAMBERS.)

TUESDAY, SEPEMBER 22.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

REGINA V. STEPHANUS.

Mr. Justice Smith remarked that this case had come before him on review. The prisoner was convicted of having contravened Section 29, Act 23 of 1888 in that he conspired with another man to break out of gaol. The only evidence against the prisoner was that he had said to a fellow prisoner: "You had better escape, as the work is too hard." There was no evidence whatever of conspiracy, and the conviction must be quashed.

REGINA V. SEALE.

In this matter, which came from the Resident Magistrate of Port Nolloth, the prisoner was charged with, and convicted of, having stolen a box containing forty-four ostrich eggs, valued at 1s. 8d. each. There appeared to be two Seales working at the copper mines, to one of whom (not the accused) the eggs and a letter had been sent. It appeared from the evidence that the prisoner, who could not read, was under the impression that the eggs had been sent to him, and as there seemed to be no intention on his part to commit theft, the conviction would be quashed.

IN RE J. J. WICHT.

On the motion of Mr. Maskew, Mr. Johannes Jacob Wicht was admitted to practice as a conveyancer.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF LE ROUX.

On the application of Sir T. Upington, Q.C., the Court granted the issue of a commission to the Resident Magistrate of of the Paarl for the purpose of taking the evidence of Maria Johanna le Roux and others concerning their dealings with the said estate.

PETITION OF DAVID JOHANNES MALAN.

Mr. Maskew moved for authority to the petitioner, who is a shareholder in the Union and Paarl Banks (in liquidation), to transfer to the estate of Charl Wynand Malan certain piece of ground adjoining the place Yzervarkin's Rug, in the district of Malmesbury, sold to the said Malan in 1855, but inadvertently omitted to be transferred.

Mr. Justice Smith remarked that there was no legal evidence before the Court to show that the liquidators or creditors consented to the application, and under these circumstances the matter would be ordered to stand over.

PETITION OF CATHERINE M. LE ROUX.

Mr. Shiel appeared for the petitioner, and moved for her appointment to represent her minor children by her first husband, in the partition of the farm Klipkuil, in the district of Robertson, and for authority to raise a loan in order to pay off a mortgage bond for £400 which has been called up by the mortgagees, Messrs. Green & Co.

HILL AND PADDON V. THE COLONIAL GOVERNMENT.

Sir T. Upington, Q.C., appeared for the applicants, and the Acting Attorney-General (Mr. Searle) for the Government.

By consent, the award of the arbitrators in the matter between the parties was made a rule of Court.

PETITION OF PETRONELLA S. NESBITT.

Mr. Webber, on behalf of the petitioner, moved for leave to sue *in forma pauperis* in an action for divorce against her husband, Frederick Nesbitt, by reason of his malicious desertion.

Referred to counsel for his certificate.

IN RE THE CAPE STOCK FARMING COMPANY, LIMITED, IN LIQUIDATION.

The Acting Attorney-General (Mr. Searle) appeared for the applicants; Messrs. McDonald, Vardy & Co., of Port Elizabeth, and Sir T. Upington, Q C., for the respondents, the executors of the late Mr. J. B. Evans.

On the 31st August last the company was placed under the operation of the Winding-up Act. The matter was mentioned in chambers on Tuesday last, and ordered to stand over for the production of certain affidavits.

The case came on for further hearing to-day, when Mr. Searle moved to rescind the order of Court of the 31st August last, on the grounds that certain facts and circumstances material for the consideration of the Court were not disclosed on the *ex parte* application. The chief facts relied upon in the present application, and which were not before the Court on the previous occasions, were:

1. That the interest on the debentures due on the 30th June last had been duly paid.
2. That of the total issue of £43,500 of debentures, £28,250 matured on the 30th June last, and that it was a condition expressed in the debentures that the holders thereof could not enforce them until default had been made in payment of principal or interest for three calendar months from the due date.
3. That certain negotiations were being conducted in London with a view to the reconstruction of the company.

The Court, after hearing the affidavits, held that no facts had been disclosed which would justify them in rescinding the order of the 31st August, and refused the application with costs. The matter of appointing a second liquidator might be again mentioned if no satisfactory arrangement could be arrived at.

IN RE THE PETITION OF ALFRED BEVERN.

On the application of Mr. Webber, the Court made absolute the rule *nisi* granted in this matter on the 15th instant.

STEYTLER V. HUDSON.

The Acting Attorney-General (Mr. Searle) appeared for the applicant, and Sir T. Upington for the respondent.

In this matter the Court made absolute the rule *nisi* interdicting the respondent from allowing drainage, slush, and refuse matter to flow from his property down to that of applicant in Somerset-road.

IN RE THE VILLAGE MANAGEMENT BOARD OF WALMER.

This matter was ordered to stand over until Tuesday next.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, SEPTEMBER 29.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

IN RE H. J. SONNENBERG.

The Acting Attorney-General (Mr. Searle) moved for the admission of Mr. Harry Joseph Sonnenberg as an attorney, notary, and conveyancer.

Mr. Sonnenberg took the oaths and was duly admitted.

GENERAL MOTIONS.

PETITION OF ELIZABETH KRETSCHMAR.

Mr. Shiel, on behalf of the petitioner, moved for leave to sue *in forma pauperis*, in an action for judicial separation against her husband, John M. Kretschmar, by reason of his violent and cruel conduct towards her.

Referred to counsel for his certificate.

PETITION OF DAVID JOHANNES MALAN

On the motion of Mr. Maskew, authority was given to petitioner, who is a shareholder in the Union and Paarl Banks (in liquidation), to transfer to the estate of Charl Wynand Malan a certain piece of ground adjoining the place Yzervarkens Rug, in the district of Malmesbury, sold to the said Malan in 1885, but inadvertently omitted to be transferred.

IN RE THE VILLAGE MANAGEMENT BOARD OF WALMER.

Mr. Shiel appeared for the applicants (the chairman and members of the Village Management Board), and the Acting Attorney-General (Mr. Searle) for the respondent (Mr. J. S. Reed).

This was an application for an order confirming the sale by the Sheriff of a certain lot of ground, marked No. 61, situated in the village of Walmer, district of Port Elizabeth, and attached under the

provisions of the Titles Registration and Derelict Lands Act, 1881. The lot in question was sold in 1858 to the late firm of J. S. Reed & Co., but transfer was only taken in 1884. The present respondent is the only surviving partner of the late firm of J. S. Reed & Co. According to the applicants no rates had been paid on the said lot, No. 61, since the year 1884, except the rates payable for 1890, which were paid on the 25th August of that year, after the lot in question had been attached by the Sheriff under the provisions of Act 28 of 1881. The applicants further alleged that since the dissolution of the partnership of J. S. Reed and Co. the respondent had frequently repudiated the ownership of the lot in question, and refused to pay the rates due on it. The lot was subsequently sold on the 29th August last as derelict in satisfaction of the rates then alleged to be due, and the present application was for confirmation of that sale.

The Court, after hearing the affidavits, held that the effect of the Derelict Lands Act had been misconceived; that the respondent, as the surviving partner of the late firm of J. S. Reed & Co., notwithstanding his repudiation of ownership, should have been proceeded against in the ordinary course for the recovery of the rates due, and on these grounds dismissed the application for confirmation of the sale with costs.

PETITION OF THOMAS C. JACKSON.

Mr. Searle, on behalf of petitioner, applied for leave to sue by edictal citation in an action for divorce against his wife by reason of her adultery.

It appeared from the petition that the petitioner, who is now living in Natal, was married to his wife in this colony, and that the alleged adultery was also committed here, but that his wife is at present living in Australia with one Oates, by whom she is reported to have had two children.

Mr. Justice Smith expressed the opinion that, the petitioner should have sought his remedy in the Natal Courts. There was no legal evidence that this Court had jurisdiction, and under these circumstances the application would be refused.

IN THE INSOLVENT ESTATES OF J. H. AND J. M. KRETZINGER.

Mr. McLachlan moved for the appointment of Mr. Thomas Blake as sole trustee in the said estates.

Mr. Searle applied for the appointment of Mr. Steyn as trustee.

It appeared from the petitions that at the second meeting of creditors Mr. Steyn represented a majority in number, and Mr. Blake a majority in value. The papers were sent to the Master and no election was declared as neither party had a majority in number and value.

The Court, in appointing Mr. Blake, provisional trustee with power to liquidate the estates, remarked that it would be well if some rule existed to meet a case like the present, in which there were two applicants for the office of trustee, by means of which after the receipt of notice the unsuccessful applicant should have to pay the cost of the application.

In the present case, under the circumstances costs would be given out of the estates, but this was a course which should not generally be followed.

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Although the right to the legitimate portion has been done away with, the rule still remains in force that advancements made by a parent and debts owing to him but not satisfied during his lifetime must, in the absence of any indication of a wish on his part to the contrary, be collated by his children so advanced or indebted for the purpose of ascertaining their shares of inheritance

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If there have been two cessions and the first cession was completed before the execution of the second one the first must prevail

Whatever the rules of the English commen law may have been before 1873, it was a settled rule of the Courts of Equity that anything written, said, or done in pursuance of an agreement and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person amounted to an equitable assignment. The substance of the transaction was looked to, and if the intention of the parties to transfer the *chose in action* or fund to the use of the assignee was manifest, the fact that somewhat inappropriate language was used for the purpose would not be allowed to defeat their intention. Notice, however, to the debtor or holder of the fund was essential to the completion of the assignment

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

MONDAY, OCTOBER 12.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN]

REGINA V. COBUS JANTJES.

Mr. Justice Buchanan said that in this case the prisoner was arrested on a charge of having committed two crimes in July last, and was sentenced at Worcester for one offence, and then removed to Tulbagh and tried there for the other offence, the Magistrate convicted the prisoner and treated the first as a previous conviction. It had been laid down in both the Supreme and Eastern Districts Courts (Buch., S.C.R., 1873, p. 18; Buch., S.C.R., 1875; Regina v. Kolibele, 8 E.D.C., 125,) that, under such circumstances, the first conviction could not be looked upon as a previous conviction under the Act. The lashes ordered to be inflicted under the sentence must be struck out, but the other portion of the sentence would be confirmed.

PROVISIONAL ROLL.

RAYNER AND CO. V. CLEMENTS BROTHERS.

Mr. Giddy applied for an order for the final adjudication of the estate of the defendants.—Granted.

MCLACHLAN BROS. V. DU TOIT.

Mr. Shiel applied for provisional sentence on a promissory note for £27.—Granted.

S.A. MUTUAL LIFE ASSOCIATION V. W. C. MULLER.

Mr. Watermeyer applied for provisional sentence on a mortgage bond for £400.—Granted; property executable.

STANDARD BANK V. I. P. H. OLIVIER.

Mr. Shiel applied for the final adjudication of the estate of the defendant.—Granted.

LOGAN V. CARTER.

Mr. Watermeyer applied for the confirmation of a writ of civil imprisonment on an unsatisfied judgment for £52 9s. 3d., and taxed costs amounting to £4 9s. 6d.

The defendant, who appeared in person, in reply to questions from the Court said he was not able to meet those liabilities at present, as he was simply a constable at the Convict-station at a salary of 2s. 6d. per diem and rations. He had been residing at Matjesfontein with Logan, and considered that his board and lodging there were compensation for services performed in connection with the electric light. He had been in the Colony about twelve months; he did not come without means, but had spent all he had. He was learning sheep-farming on the farm adjoining Logan's, and was persuaded by him to go and live with him.

Mr. Justice Smith: Can you give evidence, Mr. Watermeyer, that the man has any means?

Mr. Watermeyer: When the writ was served he was stopping at the International Hotel.

The defendant was then examined, and deposed: I am a constable on the Convict-station at 2s. 6d. per day, and have no means independent of that. My friends have made me some allowances since I have been in the Colony. The last amount I received about a fortnight ago; it amounted to £50. I expended that sum in paying various debts. I have been gambling a little, but not much.

Cross-examined by Mr. Watermeyer: I stayed with Logan from February until the end of June. I came to Cape Town with Logan and went to the International Hotel with him. I remained at the hotel nearly two months, and during that time I did no work. I paid the hotelkeeper £10, and still owe him a like sum. I expect more money from home when I get out of this difficulty.

Mr. Justice Smith: When do you expect any more money?

The Defendant: I do not expect any more while this is hanging over my head.

Mr. Justice Smith: It seems to me a very disgraceful thing, and I think you deserve to go to prison. You borrow money to gamble with, you run into debt with Logan, and here you come into court and treat the matter with levity. If I was at all convinced that there was any money coming

to you I would grant the order and suspend sentence in order to allow a chance of the money being paid. The Court will grant the order, execution of the writ to be stayed as long as the defendant pays 10s. per month, with leave to the applicant to apply again if he learns that the defendant has received any money from his friends in England.

OHLSSON AND CO. V. C. J. TIEDEMAN'S EXECUTRIX.

Mr. Watermeyer applied for provisional sentence on the balance of a mortgage bond for £72 10s., less £4 paid on account.—Granted; property executable.

R. M. ROSS AND CO. V. W. A. BAARTMAN.

Mr. Shiel applied for provisional sentence on a promissory note for £52 9s.—Granted.

RAWBONE V. MULLER, SMIDT AND CO.

Mr. Giddy applied for the final adjudication of the defendant's estate, which was granted.

SNYMAN V. SNYMAN'S EXECUTOR.

Mr. Webber applied for judgment on a "kinderbewys" for £24 0s 7d.—Granted.

LAWRENCE & CO. V. RUSSAU BROS.

Mr. Jones applied for provisional sentence on an account for £51 0s. 2d.—Granted.

SCARBROW V. REYNEKE.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £800 payable on demand with interest.

Provisional sentence granted and property declared executable.

ADMISSIONS.

The following gentlemen were admitted to practise, viz.: Mr. F. B. Steer, conveyancer; Mr. E. N. Badenhorst, translator; and Mr. P. D. Cluver, attorney and notary.

APPLICATIONS FOR REHABILITATION.

The following applications were granted: William John Henry Kemp, Hendrik Pieter Moller, Petrus Lafras Human, Petrus Jacobus Boltman, John Scott, Pieter Adriaan Stephanus Gouws, Jan's son, Frederick George Odendal, Isaac Johannes Hercules van der Merwe, William Aaron Morkel, Pieter Marais, George Innes, William Kent Stephens, Casparus Johannes Rynhoud Bresler, D.son, Dirk Gysbert van Reenen, deceased, and surviving spouse Helletje Maria Elizabeth van Reenen, Hendrik Albertyn Stigling, Gert Petrus Nicholas Coetzee.

IN RE ABRAHAM AURET.

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Mr. Searle (Acting Attorney-General) applied for process in aid of a writ issued by the High Court of Griqualand West in respect of a fine imposed on the said Auret, a witness in default, who resides beyond the jurisdiction of the said High Court. Mr. Searle said it appeared that on 25th August last, a witness named Auret did not appear at the sitting of the High Court, and the judge imposed a fine upon him under the 219th Rule of Court, a writ was issued, but the Sheriff did not feel himself justified in executing it, without the aid of the Supreme Court being sought, on the ground that Auret lived at Victoria West, and therefore out of the jurisdiction of the High Court.

The application was granted.

PETITION OF WILLIAM BURTON, JUN.

Mr. Juta applied for an order to make absolute the rule *nisi* for transfer to petitioner of certain lot of ground, No. 1, Block B, situated in King William's Town, purchased by him in 1859, but never registered in his name.

The order was granted, transfer to be made to the executor of the estate.

PETITION OF GEORGE COLE WILLEY.

Mr. Juta moved for an order directing the Registrar of Deeds to pass transfer to the purchaser of certain landed property situated at Rondebosch, being portion of the place Palmboom, registered in the name of one Richard Cole, since deceased, in trust for petitioner.

The Court granted an order authorising the Registrar of Deeds to pass transfer.

PETITION OF PETRONELLA C. NESBITT.

Mr. Webber moved for a rule *nisi* requiring petitioner's husband, Frederick Nesbitt, to show cause, if any, why she should not be admitted to sue *in forma pauperis* in an action for divorce by reason of his malicious desertion.

The rule was granted.

PETITION OF MARIA JANE WIDDOWSON.

Mr. Watermeyer applied for an extension of return day to the rule *nisi* admitting petitioner to sue *in forma pauperis* in an action against her husband for a debt due under an agreement.

Application granted.

PETITION OF CHARLES WILLIAM LEE.

Mr. Juta applied for an order allowing petitioner's service as an articled clerk to Mr. J. H. Kemp, in the City of London, to have effect as service in this colony, and for admission as an attorney of this Court, after passing such law examination as may be prescribed.

The matter was ordered to stand over until due notice had been given to the Incorporated Law Society.

IN THE INSOLVENT ESTATE OF J. A. ROUX AND CO.

Mr. Molteno moved for the appointment of Petrus Jacobus Beeman as provisional trustee in the said estate, with power to attend to the vineyard and crops.

The Court appointed Mr. P. J. Bosman as provisional trustee, with the usual powers.

In re MINORS RUDMAN.

Mr. Schreiner moved for authority to the tutor dative of the said minors to agree to certain proposed sub-division of a farm called Swanepoel's Kraal, situated in the division of Jansenville, at present held in undefined shares.

The application was granted.

PETITION OF STEPHEN BENJAMIN MATTHEWS.

Mr. Juta moved for an order giving leave to attach certain lot of ground No. 335, situated at Umtata, and a bond and legacy devolving out of the estate of Martha Ann White upon one Pemberton Holmes White *ad fundandam jurisdictionem* in an actien for debt about to be instituted by petitioner.

A rule *nisi* was granted.

ESTATE OF THE LATE JOHN DANIEL BARRY.

Mr. Juta moved for leave to the executor dative to amend the distribution account filed in the said estate by awarding the widow certain sum in part satisfaction of a claim under her ante-nuptial contract, and withdrawing the sums placed to the credit of the minor children in the Guardians' Fund.

The application was granted.

PETITION OF S. P. A. SCHOEMAN.

Mr. Joubert moved for a rule *nisi* granting permission to the applicant to make transfer of a certain quarter of the farm Wilgeboom, now registered in the name of W. Botha, in the estate of the late A. B. Barnard.

The Court granted a rule *nisi*, returnable on the first day of term, calling upon all parties interested to show cause why the said transfer should not be made.

PETITION OF O. P. VAN DER WESTHUYSEN.

On the motion of Mr. Schreiner (to which Mr. Juta consented) the rule *nisi* granted at the Circuit Court held at George on the 26th Sept., was discharged.

CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. BELSON.

On the application of Mr. Schreiner the return day in this matter was extended until the first day of next term.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, OCTOBER 20.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. MOSES FREDERICKS.

Mr. Justice Smith remarked that in this case the prisoner, a boy of fourteen, was charged with assault with intent to do grievous bodily harm. A preliminary examination had been held, but the case was remitted. The prisoner was then found guilty of common assault, and sentenced to one month's imprisonment with light prison labour and fifteen lashes. The assault was a very bad one, but as there had been no previous conviction the sentence would be amended by striking out the lashes.

The Chief Justice said that this was a case in which the Magistrate might have sent the prisoner to a reformatory.

REGINA V. LEOMAN.

Mr. Justice Smith said that in this case the prisoner had been charged and convicted of having

escaped from Robertson gaol whilst awaiting trial. The prisoner was found guilty, and sentenced to six months' imprisonment and twenty-five lashes. Under Act 23 of 1888, section 28, an unconvicted prisoner could only be sentenced to imprisonment or corporal punishment, but not to both. This sentence would also be amended by striking out the twenty-five lashes.

REGINA V. LUCAS AND WATKINS.

Mr. Justice Smith remarked that in this case the first-named prisoner was charged with having escaped from prison, and the second-named prisoner, a constable, with neglect of duty. Both the prisoners were tried together. With regard to Watkins there appeared to be no evidence against him, and as the charge might affect Watkins in the future, it would be well if the Acting Attorney-General were to look into the matter. The sentence passed on Lucas would be confirmed.

REGINA V. DAVID PETERSE.

Mr. Justice Buchanan mentioned this case in chambers last week (Tuesday, 13th inst.), and the Acting Attorney-General was asked to consider a point which arose in it. The prisoner was charged with assault and pleaded guilty. He was sentenced to three months' imprisonment with hard labour, thirty-seven days' spare diet with solitary confinement, and in addition was bound over to keep the peace for three months (after expiration of sentence) in the sum of £30. The point reserved for consideration was whether the Magistrate had the power of binding the prisoner over to keep the peace in addition to the punishment inflicted for the assault.

The Acting Attorney-General (Mr. Searle) now appeared and informed the Court that he had looked into the matter, and was of opinion that inasmuch as the prisoner, in addition to the assault, had used threats, the Magistrate was justified in binding him over to keep the peace. Counsel referred to Ordinance 32 of 1827 and to Buch., 1873, p. 17.

The Court declined to interfere with the sentence passed by the Magistrate.

GENERAL MOTIONS.

PETITION OF SARAH B. LESAR.

Mr. McLachlan, on behalf of petitioner, moved for leave to sue *in forma pauperis* in an action about to be instituted by her for the rendering of an account in the administration of the estate of her deceased husband. Referred to Counsel for his certificate.

IN THE INSOLVENT ESTATE OF MARY M. HITZROTH.

On the application of Mr. Watermeyer, the Court ordered the issue of a commission to take the evidence of insolvent's husband in regard to his dealings with the estate.

IN RE THE CAPE STOCK-FARMING COMPANY, LIMITED, IN LIQUIDATION.

Mr. Juta presented the official liquidator's first report.—The Court confirmed the report and appointed Mr. Chas. Maasdorf attorney in the liquidation proceedings. Publication to be made in the Graaff-Reinet paper, in one Port Elizabeth paper, and in the *Government Gazette* and London *Daily Telegraph*.

PETITION OF WILLEM T. HOOGENDOORN.

The Acting Attorney-General (Mr. Searle) moved for authority to the Registrar of Deeds to amend the description of certain property situated in Rose-street, Cape Town, transferred to petitioner in 1879, by setting forth in the transfer deed a correct reference to the original diagram.

The Court granted a rule *nisi* calling upon all persons interested to show cause why the order should not be granted. One publication to be made in the *Government Gazette*.

PETITION OF FRANCOIS J. NAUDE AND WIFE.

Will—Legacy—Farm—Prohibition against alienation—Bond—Registration refused by Registrar of Deeds.

Mr. Schreiner moved for authority to the Registrar of Deeds to register certain mortgage bond executed by petitioners and co-proprietors in regard to the farm Tweefontein, situated in the district of Aberdeen, notwithstanding that the will by which the wife's portion was secured contained a restriction against hypothecation. It appeared from the petition that under the will of her mother, Mrs. Naude the second petitioner inherited a third part or share of the farm Tweefontein, and the remainder of the quitrent place marked No. 658, both in the division of Aberdeen. The will, however, provided that the above-mentioned properties should not be sold, made away with, nor be hypothecated under mortgage nor burdened by the spouses so long as the heirs might be living. On the 24th June, 1891, the property was transferred in terms of the will to Francois J. Naude, married in

community of property to Francina J. Naude (born du Preez). Subsequently the petitioners and co-proprietors raised a loan on the properties in question, and gave a bond, which, however, the Registrar of Deeds declined to pass without an order of Court, on the grounds that it was not within his province to go behind the transfer aforesaid, or to inquire into the validity or otherwise of the condition in the will. The petitioners prayed that the Registrar of Deeds might be authorised to register the bond.

Mr. Schreiner: The Registrar of Deeds acted correctly in refusing to register the bond without an order of Court. The prohibition in the will is, however, inoperative as there is no gift over. (Sande, *De prohibitione alienationis*, cap. 1, p. 45, and authorities there referred to, Van Leeuwen, Roman-Dutch Law, vol. 1, p. 377.) The following cases were also mentioned in the course of the argument: "Drew v. Executor of Drew," Buch., 1876, p. 208; "Blignaut's Trustee v. Cillier's Executors," Buch., Supreme Court Reports, 1868, p. 206, and "Hiddingh's Trustee v. Hiddingh," 2 Juta, 278.

The Chief Justice, in giving judgment, said that as a matter of practice the Registrar of Deeds was quite right in refusing to register the bond until the matter had been brought to the notice of the Court. The authorities were so clear that the Court could not give effect to what was the evident intention of the testatrix. The prohibition in the will was clearly null. The legatees might, however, have prevented their husbands from alienating the properties in question. One of them had, however, joined in the present petition, and under these circumstances the application would be granted.

THE CAPE TOWN TOWN COUNCIL V. THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY.

Mr. Schreiner appeared for the applicants, and Mr. Juta for the respondents.

Mr. Schreiner moved to make absolute the rule *nisi*, granted on the 17th instant, restraining the respondents from entering or trespassing upon land transferred to applicants on the 4th July, 1891, excepting to an extent not exceeding thirty feet as shown in the diagram of the railway line.

Several affidavits were read, and the further hearing of the case was postponed until to-morrow.

SUPREME COURT.

(IN CHAMBERS).

WEDNESDAY, OCTOBER 21.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

IN RE THE WALMER VILLAGE MANAGEMENT BOARD.

The Acting Attorney-General (Mr. Searle) moved that the order as to costs, made in this matter on the 29th September, might include the costs of the previous postponement.

The Court granted the order.

THE CAPE TOWN TOWN COUNCIL V. THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY.

Mr. Schreiner appeared for the applicants and Mr. Juta for the respondents.

This matter, which was partly disposed of yesterday, came on for further hearing.

The Chief Justice remarked that the Court would like to hear Mr. Schreiner as to the construction which should be put upon Act No. 23 of 1889, section 6, sub-section *a* (the Act under which the Company are empowered to construct the line of railway to Sea Point).—Section 6 is to the following effect: "All and singular the powers which are by the Public Roads Act No. 9 of 1858 bestowed upon the Commissioners of Roads in regard to taking and acquiring lands and materials necessary for the making or repairing of any such main road as in the said Act is mentioned, or of any works in connection therewith, are hereby bestowed upon the directors precisely as if the said powers were, *mutatis mutandis*, herein again set forth, and as if the said railway were a public road." Provided: (*a*) "That the extent of the land taken for the railway shall not exceed in width 80 feet for the formation line, and sufficient additional width required for the slopes, drainage, stations, approach-roads, and all other works, matters, and things which may be requisite or necessary for the efficient construction, maintenance, and working of the said railway."

Mr. Schreiner, on behalf of the Town Council, contended that the respondents were bound by their Parliamentary plan, and that, inasmuch as "stations," goods-sheds, and similar erections did not appear on the plan, the company could not now expropriate land for such purposes. Section 6, sub-section *a*, of the Act must be read in connec-

tion with the plan. Counsel also referred to Sedgwick's case (8 Juta, 328).

The Chief Justice, in delivering the judgment of the Court, said that it was quite clear, from respondents' letter of the 6th October inst, that they claimed the whole of the land in dispute and had expropriated it. If he (the Chief Justice) were satisfied that this had been a *bona-fide* expropriation under the Act, he would have hesitated in interfering, inasmuch as a legal question of very great importance was involved in the matter, namely, as to whether the Railway Company could not expropriate more than the 80 feet in the event of their requiring a station or other building. This question was not now, however, before the Court, and was of far too important a nature to be disposed of in a summary manner on an application like the present. He was satisfied, however, that the respondents were not justified in saying that they intended to expropriate this land, and thus hold their supposed right *in terrorem*, as it were, over the owners of the land. If there had been a *bona-fide* intention to expropriate, then the expropriation should have taken place, but in his (the Chief Justice's) opinion there had been no intention to build a station on this land, and under these circumstances the applicants were quite justified in applying to the Court to prevent the expropriation. Nor was he satisfied that more than 40 feet would be required for the slopes, drainage, and other works, and under these circumstances the rule would be made absolute with costs, except as regards the 80 feet, for which 40 feet between the fences would be substituted. Leave would be given the respondents to apply for removal of the interdict, on their satisfying the Court that they required more land for *bona-fide* purposes.

Mr. Justice Buchanan remarked that the rule *nisi* had been granted because the applicants had established a *prima facie* case. The legal question which had arisen in the present application had not been decided, but it might be open for future consideration.

PETITION OF GEORGINA GLADSTONE.

On the application of Mr. McLachlan, leave was given petitioner to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce.

PETITION OF BRIDGET MCEWAN.

In this matter, the name of Mr. Webber was substituted for that of Mr. Graham as certifying counsel.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, OCTOBER 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

IN RE THE MINORS VAN ZYL.

On the motion of Mr. Jones, authority was given to the executrix testamentary of the late J. M. C. van Zyl (on the Master being satified that the debts were *bona fide* due) to raise a sum of money on mortgage of certain farm property known as Sarah's River, Running Stream, and Gorree, situated in the district of Robertson, bequeathed to the said minors, to satisfy certain liabilities due by the estate.

PETITION OF CORNELIA M. THEUNISSEN AND ANOTHER.

Mr. Juta applied for authority to the Registrar of Deeds to amend certain transfer deeds of two lots of ground, marked Nos. 18 and 14, in the village of Riversdale, by recording the estate of the late J. H. Theunissen as the owner of lot No. 14, and Hendrina R. Smith as the owner of lot 18.

The Court granted a rule *nisi* in terms of Act 28 of 1881, section 7, calling upon all persons having, or pretending to have, any right to the properties in question to appear and establish their claims to the same on the 20th November, or to be for ever barred therefrom. One publication of the rule to be made in the *Government Gazette* and in the Mossel Bay paper. An executor might be appointed in the meantime.

IN RE THE MINORS VISAGIE.

Mr. Joubert moved for the appointment of *curatores ad litem* to watch the interests of the said minors in the partition of the farm Leeuwendrift, in the district of Calvinia, in which they are co-proprietors.

The Court made the appointments in terms of the petition.

IN RE THE UNION BANK, IN LIQUIDATION.

On the application of Mr. Juta, the Court sanctioned an arrangement entered into between the official liquidators of the bank and David McKenzie and others.

PETITION OF JOHANNES C. DE KORTE.

The Acting Attorney-General (Mr. Searle) moved for an interdict restraining Emile H. van Noorden from erecting any partition or obstructing the light and air upon certain properties in Loop-street adjoining petitioner's premises.—The matter was ordered to stand over pending the giving of notice to respondent.

IN RE THE WALMER VILLAGE MANAGEMENT BOARD.

Mr. Juta applied for leave to amend the description of certain lot of ground, No. 112, sold under the Titles Registration and Derelict Lands Act, 1881, and presented the petition of Mr. H. P. du Preez, from which it appeared that at the time the petition was presented to the Court to have certain erven in the village of Walmer declared derelict, and up to the 7th October, 1891, when a certain correction was made on the general plan of the village of Walmer, a deduction of lot No. 112 was endorsed on the said plan as being transferred to Daniel Johannes Rossouw on the 28th October, 1854, and the said lot was so specified in the writ of attachment, and sold in execution on 30th August, 1891. That a letter was written by the petitioner to the Registrar of Deeds on the 17th February, 1891, asking for copies of the transfers required by the High Sheriff for the purposes of the sale. That on the copy transfer and diagram of lot No. 112, together with the transfers of the other lots sold in execution, handed to the Government conveyancers to effect transfer to the purchasers, it was discovered that the lot No. 112 (for which a copy was granted by the Registrar of Deeds) was not situated at Walmer, but in the village of Richmond, division of Graaff-Reinet, and that the true lot No. 112, village of Walmer, and which became derelict and was attached, advertised, and sold as such was registered on the 6th October, 1854, in the name of Joshua Williamson Kemp. That the petitioner's clerks employed to search in the Deeds Office must have been misled by such endorsement on the general plan, and assumed that lot 112 was registered in the name of Daniel Johannes Rossouw since it was so endorsed on the said plan of the village of Walmer. Wherefore the petitioner prayed that the previous order of Court might be amended by the insertion, after the words lot 112, Joshua Williamson Kemp, instead of Daniel Johannes Rossouw, and the date 6th October, 1854, substituted for the date 28th October, 1854, and the extent one morgen substituted for 70 square roods and 120 square feet.

When the facts had been stated by Mr. Juta,

The Chief Justice said: The Court will make the order as prayed, but I must take this opportunity of saying, and I hope what I do say will come to the notice of conveyancers generally, that in my opinion conveyancers should not leave these important duties to inexperienced clerks. The complaint has often come to my hearing that inexperienced clerks are sent to the Registrar of Deeds' office to make investigations and do what is necessary for conveyancing. The conveyancer is paid for his work, and if he has not sufficiently experienced clerks, he should go personally. Here we have a person who complains that his clerks have made the mistakes—apparently inexperienced clerks. Now if he had gone himself, and taken pains in the matter, all these mistakes would never have occurred. But this is not an isolated case; the complaint has often been made to me, especially by the Registrar of Deeds, that many clerks have to be taught their business by the Registrar of Deeds instead of by the conveyancer himself, who is paid for his work. In future the Court will simply have to mulct conveyancers with heavy costs in order to put an end to this practice. The costs of the present application will be paid by the petitioner.

Mr. Justice Smith remarked that this was the third mistake that had been made in this matter.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, NOVEMBER, 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.

ADMISSION.

On the motion of Mr. Shiel, Mr. E. N. Badenhorst was admitted as an attorney, subject to the production of an affidavit of additional service in accordance with the order of Court made on the 20th November, 1890; the oaths to be taken before the Resident Magistrate of Colesberg.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF SEBASTIAN VALENTYN VAN REENEN.

The Acting Attorney-General (Mr. Searle moved for leave to two of the trustees of the said estate to institute an action, without the

assistance of their co-trustee, whose whereabouts is unknown, against the executors of the late Mrs. Frances Versfeld, to set aside certain notarial deed and will executed by her in 1886.

The Court granted a rule *nisi*, returnable on the first day of next term, calling upon the absent trustee to show cause why he should not be removed, one publication to be made in the *Government Gazette*. The applicants to proceed with the action and liquidate the estate

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IN RE THE INSOLVENT ESTATE OF WILLIAM W. MORRISON.

Trustee—Removal under Section 52, Ordinance 6 of 1843.

Mr. Schreiner presented the petition of Mr. George William Steytler, one of the trustees of the above-mentioned estate.

It appeared from the petition that the estate was surrendered on 17th October, 1888, and that on the 6th November, 1888, the petitioner and Mr. Duncan McDonald were appointed joint trustees; that the liquidation and distribution of the estate had been duly completed, and the final account confirmed on the 12th September, 1885; that the second-named trustee, Mr. Duncan McDonald, left the Colony some years ago, and his present whereabouts are unknown; that the trustees of the Cape of Good Hope Permanent Building, Land, and Investment Society, as mortgagees, on the 5th November, 1884, took over from the aforesaid insolvent estate the immovable property thereof for the sum of £700, and that they now demanded transfer. The petition concluded with a prayer that Mr. Duncan McDonald might be removed from his trusteeship.

The Court ordered the removal of McDonald as trustee, and conferred upon Mr. Steytler power to proceed with the liquidation of the estate as sole trustee.

IN THE INSOLVENT ESTATE OF HENDRINA JACOBA WILHELMINA KLERCK.

On the application of Mr. Juta, leave was given to the assignees of the estate of Myburgh & Co. to amend their proof of debt against the said estate by recording it as a preferent one, by virtue of a deed of hypothecation instead of a concurrent one, as proved in error.

PARTRIDGE V. PARTRIDGE.

In this matter, Mr. Watermeyer was appointed counsel for the plaintiff in the place of Mr. Graham, who is at present absent from the Colony.

PETITION OF JOSEPH MOORE.

On the motion of Mr. Jones, the Court made absolute the rule *nisi* for the cancellation by the Registrar of Deeds of certain mortgage bond passed by petitioner's father, the late Thomas Meore, in 1841, in favour of Jan Ferdinand Seemen, by whom it was ceded to Thomas Skuker, neither of whom can be found.

IN RE JOHN ALFRED HONEYBORNE, AN ALLEGED LUNATIC.

Mr. Molteno applied for the appointment of a *curator ad litem* in proceedings about to be instituted to have the said Honeyborne declared to be of unsound mind and incapable of managing his affairs.

The Court granted a rule *nisi*, returnable on the first Tuesday in next term, calling upon the alleged lunatic to show cause why he should not be declared of unsound mind and incapable of managing his affairs, and appointed Mr. Shiel his *curator ad litem*.

IN RE THE MINORS MORONEY.

Mr. Shiel moved for authority to the Master to pay out of the sums to the credit of the minors in the Guardians' Fund an annual allowance of £84 each to defray the costs of their maintenance and education.

The Court granted the order on the Master being satisfied that the amounts required were fair and reasonable.

IN RE THE MINORS VAN HEERDEN.

On the application of Mr. Tredgold, the Court granted leave to the tutor dative of the said minors to take transfer on their behalf in settlement of their paternal inheritance of certain share in the farm Rietkuil and Vaal Vallei, situated in the district of Cradock, the property of their mother, now married to Fredrik Prinsloo.

MORTIMER AND CO. V. HERBST.

Shares in bank in liquidation—Non-indorsement—Pledge.

Where unindorsed shares had been pledged as collateral security on an overdue promissory note, and the shares were claimed by the pledgor's brother, the Court refused *on motion* to order the respondent (the brother) to transfer the shares or to give a power of attorney authorising applicants to receive dividends due or to become due in respect of the same.

Mr. Schreiner appeared for the applicants, and Mr. Juta for the respondent.

This was an application for an order requiring the respondent to transfer to applicants certain eight shares in the Western Province Bank, or otherwise to grant a power of attorney authorising them to receive from the liquidators of the said bank all dividends due and to become due in respect of the said shares.

It appeared from the affidavits that the shares in question had been pledged by a brother of the respondent as collateral security for a debt of £179 due by him to the applicants on an overdue promissory note. The shares were not endorsed, and the respondent in his affidavit denied that he had ever been indebted to the applicants, and could not account for their being in possession of the shares.

After argument, the Chief Justice said that this was not a matter which ought to be disposed of on motion. The respondent had certainly not satisfactorily explained how his brother had become possessed of the shares, still he could be in no worse position than a surety, and it was the duty of the applicants to have first proceeded against the principal debtor. The applicants might bring an action in the ordinary course, but the present application would be refused with costs.

SEARLE AND CO. V. STANDER.

Judgment — Execution — Return of *nulla bona*—Share in immovable property—Attachment.

Mr. Molteno moved on behalf of applicants for an order interdicting the respondent from alienating or mortgaging his property, situated in York-street, George Town.

It appeared from applicants' affidavit that the respondent was indebted to Messrs. Searle & Co. in the sum of £13 8s. 5d., for which amount a judgment was obtained by the said firm against the respondent in the Resident Magistrate's Court at George on the 17th October last. A writ of execution against the movable property of the respondent was issued on the 19th October, and a return of *nulla bona* was made. That the respondent was entitled to quarter-share of some immovable property, situated in George Town, valued at £100, and that he was attempting to sell his share in this property with the object of defeating his judgment creditors.

The Court authorised the Sheriff to attach the immovable property in question, pending such further proceedings as the applicants might be advised to bring to have the property declared executable.

[Before Mr. Justice SMITH, in Chambers.]

WARREN V. CLEMENTS.

Landlord and tenant—Act 20 of 1856, section 26 — Removal of goods by tenant — Attachment—Lien—*Mandamus*.

In this matter Clements, a monthly tenant of Warren at Cape Town, on the last day of October, no rent being then in arrear, moved from Warren's house without having paid the rent, and as Warren contended, with the intention to evade payment of the same.

Mr. Hartill (for Warren) applied to the Resident Magistrate, Cape Town, for an interdict to attach the tenant's goods in terms of section 26, Act 20 of 1856, which being refused by the Magistrate, application was now made to Mr. Justice Smith for a *mandamus* compelling the Resident Magistrate to grant the order, the case of the Board of Executors v. Stigling, Buch. 1868, p. 25 being relied upon.

His Lordship refused the application for a *mandamus* holding that the Board of Executors v. Stigling did not apply, and that *where a tenant had removed his effects either before rent was due; or before an interdict had been granted; the goods could not be followed up and that the landlord's lien was lost.*

SUPREME COURT.

(IN CHAMBERS)

TUESDAY, NOVEMBER 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

IN THE INSOLVENT ESTATE OF BERNHARD PILGRAM.

Insolvency—Ordinance 6 of 1843, section 28—Set off—Leave given to amend proof of debt.

Mr. Schreiner appeared for the applicants (the Cape of Good Hope Marine and Fire Assurance Company), and Mr. Juta for the respondents (the trustees in the insolvent estate of Bernhard Pilgram).

This was an application for leave to the Cape

of Good Hope Marine and Fire Assurance Company to amend their proof of debt in the said estate, by setting off against the same such sums as have or may become due to the insolvent in respect of thirteen shares in the said company, now in liquidation, after satisfying the preferent claim. It appeared from the affidavit of Mr. F. F. Rutherfoord, chairman of the applicant company, that the insolvent was indebted to his company in the sum of £400, being the balance of a promissory note originally for £500, as security for which certain shares had been pledged, and that on the 24th December, 1890, the company had proved on the insolvent estate for the said debt. That the insolvent was at the date of his insolvency a shareholder in the company and was the registered holder of thirteen shares, and that before his insolvency the directors had, in November, 1890, agreed provisionally, and subject to ratification by the shareholders, to sell and dispose of the business of the company to the Guardian Assurance Company, and that afterwards, on the 8th December, 1890, and before the said insolvency, the shareholders of the company, at a meeting held for that purpose, confirmed the sale, and resolved to liquidate the company. That the thirteen shares belonging to the insolvent were, prior to his insolvency, pledged to the Cape of Good Hope Fire Assurance and Trust Company as security for a debt, and due notice of such pledge was given to and accepted by Mr. Rutherfoord, who after the insolvency, and with the full knowledge and concurrence of the trustees of the insolvent estate, paid the dividends accruing on the said shares to the Cape of Good Hope Fire Assurance and Trust Company until their claim was satisfied, and that since the latter claim has been satisfied, dividends to the amount of £60 10s. 5d. have been awarded on the said shares; and deponent claimed the right to set off these dividends against the company's claim on the insolvent estate, and also any dividends which may hereafter become due to the said estate. That in proving the said claim against the insolvent estate deponent omitted to state that he claimed the right to set off the refund which would accrue to the said estate on the said shares (subject to the prior claim under pledge in favour of the Cape of Good Hope Fire Assurance and Trust Company). The petition concluded with a prayer that the Court would be pleased to allow Mr. Rutherfoord to amend his proof of debt on the insolvent estate by deducting such sums as have become due since the settlement of the claim of the said Cape of Good Hope Fire Assurance and Trust Company, or as may hereafter become due to the said estate upon the shares registered in the name of the insolvent.

Mr. H. Gibson, one of the trustees in the insolvent estate, denied that the dividends on the thirteen shares referred to above had been paid over to the Cape of Good Hope Fire Assurance and Trust Company with the full knowledge and concurrence of the trustees, and alleged that it was only after the dividends had been paid over, and on receipt by the trustees of the accounts, that they became aware of the manner in which the dividends on the said shares had been dealt with, and that immediately on receipt of the said accounts the trustees called upon Mr. Rutherfoord to value his securities, which up to the present he had not done, and which he also neglected to do in the proof of debt filed by him in the said estate.

Mr. Schreiner, in support of the application contended that the principle established in "Hiddingh's Executors v. Hiddingh's Trustee" (4 Juta, 200) applied, and should govern the present case.

Mr. Juta: There can be no set-off, unless the debts and credits can be ascertained at the time of proof. Counsel referred to the 28th section of Ordinance 6 of 1843.

The Chief Justice, in giving judgment, said: The case of "Hiddingh's Executors v. Hiddingh's Trustee" is clearly applicable, and the correctness of the principle may be tested by the case put by me during argument. If the trustees of the insolvent had at any time sued the applicant company for any dividend accruing due in the course of the liquidation the applicants would have had a good answer to such action, that answer being that there was a larger sum which was due to applicants, and I don't think this answer is any way affected by the Insolvent Ordinance. In any case, there is the decision, and I think the application must be granted with costs of opposition.

PETITION OF STEPHEN BENJAMIN MATTHEWS.

On the motion of Mr. Juta, leave was given to attach certain assets devolving upon members of the late firm of White Bros. out of the estate of Mary Ann White (deceased), and authority given to petitioner to sue by edictal citation the said partnership for the recovery of the amount of two promissory notes. Personal service to be effected and citation to be made returnable on last day of next term.

PETITION OF THE GENERAL ESTATE AND ORPHAN CHAMBER.

On the application of Mr. Juta, leave was given to attach *ad fundandam jurisdictionem* certain funds in petitioners' hands, received on account of Edward Gates Watson and two other heirs of the estate of the late Thomas Watson, and to sue the

heirs by edictal citation in an action for recovery of certain judgment of the Supreme Court in respect of shares in the Union Bank, registered in the name of Watson's Estate.

IN RE THE CAPE STOCK-FARMING COMPANY, IN LIQUIDATION.

Company in liquidation—Application for appointment of two liquidators (in addition to one already appointed) refused.

Mr. Schreiner appeared for the applicant, and Mr. Juta for the respondent.

This was an application for the appointment of two additional official liquidators in respect of the winding up of the said company.

Mr. Schreiner read the petition of Mr. John Eyre Vardy, of Port Elizabeth, in his individual capacity and representing the London directors and liquidators. It appeared from the petition that the company was incorporated in England under the Joint-stock Companies Acts, 1862 to 1867, and that it carried on its operations in this colony until 31st August, 1891, when it was placed under the operation of the Winding-up Act of 1868, when Mr. C. J. Brugman, of Graaff-Reinet, manager of the Midland Agency and Trust Company, was appointed liquidator. The petition went on to say: That your petitioner is individually a shareholder in the company, holding fifty shares of £100 each, and in respect of which £50 per share has been paid up; that your petitioner has recently ascertained that at a general meeting of the company, duly convened, and held at its offices, No. 2, Suffolk-lane, Cannon-street, in the City of London, on the 14th September last, the following resolutions were passed: "That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, and that it is desirable to wind up the same, and accordingly that the company be wound up voluntarily"; and "That John Matheson Macdonald, Alexander James Macdonald, and Alfred George Renshaw be, and they are hereby, appointed liquidators for the purpose of such winding up." That the three persons named in the last-mentioned resolution are respectively directors of the company. That on the 18th September, 1891, John Matheson Macdonald and Alfred George Renshaw, two of the said liquidators and directors of the company, acting in pursuance of section 133, sub-section C, of the Companies Act, 1862, under their hands and seals, and under the seal of the company, executed a power of attorney in favour of your petitioner, appointing him the attorney in this colony of the company, and of the liquidators thereof, with the powers therein set forth, including the power to delegate any of the powers and authorities thereby vested in him. That your petitioner has by the mail from England which reached Port Elizabeth on the 21st day of October instant received advices from the said liquidators and directors of the company that the High Court of Justice in England did, on the 30th day of September, 1891, make an order recognising the placing of the company under voluntary liquidation, and the appointment of the said John Matheson Macdonald, Alexander James Macdonald, and Alfred George Renshaw as liquidators, in terms of the resolution hereinbefore cited. That your petitioner is a partner in the firm of Macdonald, Vardy & Co., of Port Elizabeth, which firm was, by a power of attorney dated the 13th April, 1882, appointed generally to act on its behalf in this colony, and he has been concerned in the management of the company's affairs, and is intimately acquainted with all the details of the accounts in the Colony. That as a shareholder, and representing the interests of the shareholders and debenture holders in England (being the majority of both), through the power granted to your petitioner by the said liquidators appointed in England, and recognised by the High Court of Justice there, your petitioner submits that it is highly desirable and expedient in the interests of all concerned that some person or persons should be joined with the said Christoffel Jacobus Brugman to represent and protect the interests of such shareholders and debentureholders other than the estate of the late J. B. Evans, who was the vendor of the landed estate (with other property) to the company. That your petitioner has been requested by cable advices this day received from the English liquidators above named to apply for the appointment of himself as co-liquidator with the said Christoffel Jacobus Brugman. That your petitioner considers that it will be of advantage that some disinterested and qualified person be further appointed to act as co-liquidator with himself and the said Christoffel Jacobus Brugman. That Frederick William Ramsay Denny is an accountant carrying on business at Port Elizabeth, and a person well versed in all matters connected wth the liquidation and winding up of estates. That your petitioner and the said Frederick William Ramsay Denny are fit and proper persons to be joined with the said Christoffel Jacobus Brugman as official liquidators of the said company with the same powers. Wherefore your petitioner prays that your lordships may be pleased to appoint him and the said Frederick William Ramsay Denny to act in conjunction with the said Christoffel Jacobus Brugman as official liquidators of the said company with the same powers which have been granted to him, or that your lordships may make

such appointment or grant such relief as may seem meet in the premises.

Mr. Juta opposed the appointment of Mr. Vardy, but had no objection to the appointment of Mr. Denny as a co-liquidator with Mr. Brugman.

The Chief Justice, in giving judgment, said that he had no doubt but that if the claims of Mr. Vardy had been brought to the notice of the Court when the application was made for placing the company under the Winding-up Act, he would have been appointed a co-liquidator. Mr. Brugman, since his appointment as liquidator, had conducted the liquidation in a satisfactory manner and until the company could show that he had failed in his duty, the Court ought not to depart from its original order. The application would consequently be refused, costs to come out of the estate.

SUPREME COURT.

(IN CHAMBERS.)

TUESDAY, NOVEMBER 17.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

IN RE GIDDY.

On the application of Mr. Shiel, Mr. Lennox Llewellyn Giddy was admitted as an attorney and notary, the oaths to be taken before the Registrar of the Eastern Districts Court, Graham's Town.

IN RE MCKENZIE.

On the motion of Mr. Jones, Mr. Martin Edward McKenzie was admitted as a notary, the oaths to be taken before the Resident Magistrate of Port Elizabeth.

IN RE THE CAPE CENTRAL RAILWAYS, IN LIQUIDATION.

Mr. Schreiner presented the second annual report of the official liquidator of the above company, and moved for the sanction of the Court to a supplementary agreement entered into with the vendee on the 6th October last, by which the time for payment was extended.

The Court granted the required sanction, and made the usual order as to publication.

SUPREME COURT.

FRIDAY, NOVEMBER 20.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

PAARL BANK V. CLEMEN.

Mr. Joubert moved for provisional sentence on a mortgage bond for £800, with interest. Provisional sentence granted and property declared executable.

JOHNSON V. VADE.

On the motion of Mr. Tredgold provisional sentence was granted on a promissory note for £92.

SMITH V. CROESER.

On the application of Mr. Maskew provisional sentence was granted on a promissory note for £82 18s. 6d.

FINDLAY AND TAIT V. HERBST.

On the motion of Mr. Jones provisional sentence was granted on four promissory notes of £10 each.

DU TOIT V. LOUW.

Mr. Schreiner appeared for the plaintiff and Mr. Juta for the defendant.

It was agreed in this matter that the principal case should be gone into.

NOBLE V. FRISBY.

The Acting Attorney-General (Mr. Searle) moved for provisional sentence for £12 15s., being the amount paid by the plaintiff (in his capacity as Clerk of the House of Assembly) to the defendant upon a false certificate signed by the said defendant as a witness before the Select Committee on "Griqualand West Trade and Business," in July, 1891.

The Chief Justice: This appears to be a criminal matter.

Mr. Justice Smith: In cases in which a man is to be criminally prosecuted it is desirable that the prosecution should precede the civil action.

Mr. Searle: The law is clear that the civil remedy is not barred by a criminal prosecution. Cases on the subject have been decided to that effect in the Eastern Districts' Court.

Provisional sentence granted.

ELDER'S EXECUTORS V. LINDER.

On the motion of Mr. Joubert provisional sentence was granted for the sum of £97 7s. 6d., cash advanced.

REHABILITATIONS.

On motion from the bar the rehabilitation of the following insolvents was granted: George Wilhelm, Simon Hercules Fontein, Johannes Christian Kruger, Charles Lilford, Andrew Stewart, Benjamin Johannes Smit, Daniel Nicolas Johannes du Toit, Christian Andries Johannes Cronje, and George Butler Curle.

GENERAL MOTIONS.

CAPE OF GOOD HOPE BANK (IN LIQUIDATION) V. REV. W. E. BELSON.

Company—Bank in liquidation—Shares—Contributory—Life Policies—Cession with alleged object of defeating creditors—Attachment—Sale—Rule *nisi* made absolute.

Mr. Schreiner moved for an order making absolute the rule *nisi* for the attachment and sale by the Sheriff of certain two policies of life assurance, effected by the respondent with the South African Mutual Life Assurance Society, in satisfaction of the amount of call on 118 shares in the said bank, registered in the respondent's name. Due service had been made upon the respondent at Buda-Pesth, who stated that he had ceded the insurance policies apparently to one F. Ross Parkes, also resident at Buda-Pesth, who was paying up the premiums. There was no cession of the policies registered in the books of the society, which should be done according to the terms of the trust deed. Mr. Schreiner contended that Mr. Parkes must have known the position of affairs when he took over the policies.

The Chief Justice: The respondent has had due notice. The rule will be made absolute with costs.

INSOLVENT ESTATE OF NICOLAAS J. BOTHA.

Mr. Juta moved for an order authorising Thomas S. Sheard, one of the trustees in the said estate, to realise the assets therein, and frame liquidation accounts, without the assistance of his co-trustee, Paul Nel, who has left the Colony without appointing any person to act in the matter.

The Court granted a rule *nisi* calling upon Nel to show cause why he should not be removed from his trust, personal service to be made; Sheard to be authorised to administer the estate without the assistance of his co-trustee.

PETITION OF IDA MOSS.

Mr. Shiel applied for leave to sue by edictal citation in an action against petitioner's husband, Henry Charles Moss, for divorce by reason of his adultery and cruelty, and for the custody of the two minor children.

The Court ordered the matter to stand over for the present.

REGINA V. CHRISTIAN CAROLUS.

Vagrancy—Act 23 of 1879—Conviction under section 2—Appeal.

This was an appeal from a conviction and sentence by the Resident Magistrate of Namaqualand in criminal proceedings instituted under the Vagrancy Act.

Mr. Schreiner appeared for the appellant, who, he said, was charged with contravening section 2 of Act No. 23 of 1879, and on conviction was sentenced to take service for three months at a remuneration of 10s. per month.

The Acting Attorney-General said he did not intend to advance any arguments on behalf of the Crown.

The Chief Justice observed that the appellant might have given a clear answer to the constable when questioned as to his means of support.

Mr. Searle thought that section 2 of the Act should be liberally interpreted, as it was somewhat vague.

Mr. Schreiner said it had not been proved that the appellant was not possessed of sufficient means of support. He had a horse and gun, and also said that he had some stock in the Bokkeveld.

The Chief Justice said that as the Acting Attorney-General did not object to the quashing of the conviction, the Court would give an order to that effect. The terms of section 2 were very wide, and the Magistrate should have used some little discretion in dealing with it. He did not think the section was intended to apply to cases of this kind.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne.]

MANTLE V. MANTLE.

This was an action brought by the wife for restitution of conjugal rights.

Mr. Castens appeared for the plaintiff. The defendant was in default, and had been sued by

edictal citation, but personal service could not be effected.

Martha Mantle deposed that she was married to William Mantle on the 6th March, 1883, at Kimberley, and left there immediately for Philip's Town, where they resided for two years. She then went to Germany, where she remained for two years, at the expense of her family. On her return to the Colony her husband joined her at Port Elizabeth, where they cohabited for about six months. From Port Elizabeth she went to her uncle's at Philip's Town, and since then she had never set eyes on her husband. She went to Kimberley in search of him, but could not find him. Since 1889 he had never contributed anything towards her support or that of her children. At present she kept a boarding-house. She had never had any serious quarrel with her husband, and could not account for his desertion. She had received letters from him since his disappearance, but had destroyed them.

The Chief Justice said that the Court would grant a decree for the restitution of conjugal rights, and order the defendant to return to or receive the plaintiff on or before the 1st June next, failing which, a rule would be issued calling upon the defendant to show cause by the last day of the June term why a decree of divorce should not be granted. Personal service on the defendant, if possible; failing which, service on his father in Germany.

BARRINGTON V. BARNARD.

Trespass—Action—Damages—Right to fell timber under agreement—Boundaries.

Sir T. Upington, Q.C., and Mr. Juta, for plaintiff; Mr. Schreiner, and Mr. Molteno, for defendant.

This was an action instituted to recover damages, laid at the sum of £500, for wrongful trespass upon the property of the plaintiff, Mr. J. W. S. Barrington, of Portland, in the Knysna division, against Mr. Jacs. L. Barnard, the proprietor of an adjoining farm. On the 12th July, 1888, an agreement was entered into between the parties, by which Barrington granted Barnard certain rights of wood-cutting on a certain portion of his property. The plaintiff's allegation was that defendant had trespassed on other property and destroyed a very valuable piece of forest land. The plea alleged that according to agreement there had been no trespass. There was a claim in reconvention for wood seized by plaintiff.

Mr. J. W. S. Barrington deposed that when the agreement was entered into in 1888 the boundaries of the forest land he desired to let on lease were distinctly pointed out to the defendant. A plan was also drawn up, and the agreement was written by Mr. Attorney Robinson, of the Knysna. The defendant trespassed on the left side of his property, and cut away a lot of valuable timber. He gave permission to defendant to make a slip-path for the purpose of getting his wood out from the Portland River to the westward. This was about April, 1890. When he learned that there had been a trespass he wrote to the defendant and notified him that he had confiscated the fallen wood. He received no reply to his communication. The damage to the forest he estimated at £500, as the bush contained specially valuable timber. He claimed trespass both to the left and the right of the slip-path. The value of the wood he seized was about £162, or the amount of double the licence money. If he was buying in the market, he would not give more than £81. Every tree in the leased forest land had either been girdled or hacked about.

By the Court: The diagram or plan was attached to the letter to the attorney at Knysna prior to the agreement being entered into. There was no dispute about the rents, which had been paid.

SUPREME COURT.

MONDAY, NOVEMBER 23.

[Before the Chief Justice (Sir J. H. DE VILLIERS K.C.M.G.), Mr. Justice SMITH, and Mr Justice BUCHANAN.]

RE PAARL BANK, IN LIQUIDATION.

Sir T. Upington said he had been asked to mention to the Court the matter of the Paarl Bank (in liquidation), one of the motions passed over the other day for the purpose of hearing the case of *Barrington* v *Barnard*. He was informed that this matter required to be dealt with as soon as the Court could conveniently take it. There were certain compromises proposed, and he moved that the petition of the liquidators, Messrs. De Villiers, Perold, and Steytler, be now considered. The list of compromises had been duly published in the *Government Gazette* and other papers, in accordance with an order of the Court. An objection had been filed by the liquidators of the Western Province Bank against the proposed compromises by the Messrs. Retief, but their objection had been withdrawn, and the liquidators were of opinion that, in the interest of the credi-

tors of the Paarl Bank, the compromises should be confirmed. In respect to the compromise of S. P. Malherbe, they were of opinion that it should be postponed for the present.

The Court sanctioned the confirmation of all the proposed compromises with the exception of that of S. P. Malherbe.

The following is a list of the proposed compromises:

Rev. Gilles van de Wall offers for his liability (£5,000) on twenty shares, a cash payment of £3,200, and to surrender a fixed deposit of £700 with interest in the Paarl Bank.

Executrix Estate late Charles Daniel Cillie offers for her liability (£5,000) on twenty shares, a cash payment of £1,500, with interest from 12th February, 1891.

Jacob Petrus Goosen offers for liability (£750) on three shares, cash payment of £600, with interest from same date.

Johannes H. A. Basson offers for his liability (£16,250) on 65 shares, a cash payment of £500, with interest from same date.

Stephanus Francois du Toit offers for his liability (£16,500) on 65 shares, a cash payment of £1,150, with interest from same date.

Catherina Sophia Bosman (born Louw), executrix testamentary in the estate of the late Jan Daniel Bosman, offers for her liability (£3,750) on fifteen shares, a cash payment of £1,000, payable in yearly instalments of £250 each.

Francois Stephanus Cillie offers for his liability (£500) on two shares, and other liabilities due to the bank on promissory notes, direct £611, and indirect £135, a cash payment of £200, with interest from 12th February, 1891.

Petrus Jacobus Retief offers for his liability (£3,750) on fifteen shares, a cash payment of £750, with interest from the same date.

Abraham Barend de Villiers, P.J. son, offers for his liability (£6,000) on twenty-four shares, a cash payment of 5s. 3d. in the £, with interest from same date.

Willem Daniel Malherbe offers for his liability (£12,500) on fifty shares, a cash payment of £1,500, and fixed deposit in Paarl Bank of £150, with interest from same date.

Adriaan Albertus Furtur offers for his liability (£4,250) on seventeen shares, a cash payment of £300.

Jan Stephanus de Villiers, J.son, offers for his liability (£3,750) on fifteen shares, a cash payment of £1,250, and to transfer all rights to fixed and floating deposits standing in his name in the Paarl Bank, amounting to £528 0s. 6d., with interest from 12th February, 1891.

Petrus Jacobus Malherbe, Gid.son, offers for his liability (£7,750) on thirty-one shares, a cash payment of £1,200, with interest from same date

Gideon Joubert, W. son, offers for his liability (£5,250) on twenty-one shares, a cash payment of £2,000, and to transfer fixed deposit standing in the name of his daughter in the Paarl Bank amounting to £100 and interest due thereon to the liquidators, with interest from the same date.

Francois J. Hugo, P.son, offers for his liability (£7,500) on thirty shares, a cash payment of £2,000, with interest from same date.

Willem Adolph Krige offers for his liability (£4,000) on sixteen shares and other liabilities on promissory notes amounting to £155, a cash payment of £600, with interest from same date.

Isaac Jacob de Villiers, A.B.son, offers for his liability (£1,500) on six shares and promissory notes amounting to £1,638 2s. 10d., a cash payment of £800, and certain erf with the buildings thereon and valued at £150, with interest from same date.

Stephanus Petrus Malherbe, jun., offers for his liability (£243) on promissory notes a cash payment of £100, with interest from same date. [Postponed.]

Estate late Roeland Abraham Perold; executrix offers for liability (£5,000) of estate on twenty shares and promissory notes, direct £75, and indirect £15, the sum of £100, payable £50 in cash, and £50 within twelve months.

Christian Lodewyk Wicht offers for his liability (£3,750) on fifteen shares, a cash payment of £1,875, and to surrender all fixed and floating deposits in the Paarl Bank amounting with interest to £2,099 9s. 1d., with interest from 12th February, 1891.

Godlieb Wilhelm Anthonie de Villiers offers for his liability (£2,750) on eleven shares, a cash payment of £750, with interest from same date.

Jacob Daniel Retief, P.son, offers for his liability (£1,500) on six shares, a cash payment of £300, with interest from same date.

Francois Hermanus Retief, P.son, offers for his liability (£4,000) on sixteen shares, a cash payment of £250, with interest from the same date.

Isaac Bisseuix offers for his liability (£3,750) on fifteen shares, a cash payment of £500, with interest from same date.

Jozua Petrus Malherbe offers for his liability (£4,500) on eighteen shares, and as endorser on a promissory note due by S. P. Malherbe to the bank of £139, a cash payment of £550, and to surrender a fixed deposit receipt of £200 with interest.

Jacobus Johannes le Roux, Joz.son, offers for his liability (£3,750) on fifteen shares, and liabilities on promissory notes amounting to £700 direct and £270 indirect, a cash payment of £1,250, and an expected inheritance out of the estate of the late David Marais, A.P.son, subject to certain contingencies, and valued at £350.

Jacob Hugo offers for his indirect liability of £428 14s. a cash payment of £107 8s. 6d.

BARRINGTON V. BARNARD.

The hearing of this action was resumed,

Daniel Prinsloo deposed that by order of the plaintiff he cut the line of demarcation. Barnard had cut away timber outside his boundary.

George Rex Atkinson deposed that in April last he went on Barrington's property, and heard men cutting wood there. He was going down to his work along the slip-path, and saw Barnard, who taunted him with waiting until he had made the road before commencing work. He also told witness that he had to pay Barrington for the road, and his men had felled two trees lower down, as he did not see why he should work for nothing. In consequence of seeing Barnard's men working on what he considered was Barrington's property, he sent a communication to the latter. The forest cut down was a valuable piece of property. He considered that £500 was not too large an amount for the timber as it stood, but it would be too high for the market. It was close to Barrington's homestead. He valued the wood at £200, but the land and wood together would be worth between £400 and £500. It would take a generation to replace the yellowwood trees on the ground where they had been cut down.

Cross-examined: The land in question was in extent between twelve and fifteen acres. Large numbers of trees were cut down, and had been removed by Barrington; there were very few left standing.

Jacobus Nicolaas Niemand, Hendrik Westworth, Andries Hensburg, Frank Kitching, woodcutters, deposed to the position of the disputed property.

Arthur William Robinson, attorney, resident at the Knysna, deposed that he drew up a draft agreement between the parties, and the boundaries of the ground were duly defined and explained both to plaintiff and defendant. A slight alteration was made in the agreement, which was initialled by the defendant.

For the defence

Jacobus L. Barnard, the defendant, deposed that he had resided for eighteen years in the Knysna district. In 1888 he made an agreement with the plaintiff to cut wood on a certain portion of his property. The land was clearly defined on a sketch plan attached to the agreement; it was to run from the watershed of the Portland River to that of the Knysna River. Work was commenced on the disputed land on the 11th April last. The slip-path mentioned ran through that ground. He was away at Middelburg on "togt" for some weeks, and ordered his woodcutters not to trespass on Barrington's property. When he returned from Middelburg he received Barrington's letters. His men had not gone beyond his instructions. He valued the wood cut at £110; all he removed was wood valued at £7 15s. In his opinion he had a loss of £60 by the stopping of the work; some of the cutters were working out old debts. When the men were stopped working by Barrington they scattered and sought other work. He never had any explanation of the letter sent to Robinson at the Knysna. The ground in dispute was in extent about 8½ morgen. Plenty of wood was left standing; everything was not destroyed.

Cross-examined: He never saw the plan produced, nor did he see the letter sent to Robinson by Barrington. He did discuss the boundaries with the plaintiff, but not with Robinson. He did not know the exact date when he initialled the alteration in the agreement. The undisputed bush was of little value. When he went on "togt" he left his son in charge of the wood-cutting. He valued the piece of disputed forest at £260.

Stephanus Marthinus Barnard, son of the defendant, deposed that he drew the sketch plan produced. He looked after the men during his father's absence, and never saw them working over the line fixed under the agreement with Barrington.

Cross-examined: He received letters from Robinson during his father's absence, but did not deal with them because he did not know what arrangements had been made.

Adam Johannes Barnard deposed that he knew both parties to the suit. He had been connected with forest work for about forty years. In May last he worked in the disputed forest for Barnard, but was not present when the boundary was pointed out. He and others with him worked on both sides of the slip-path. He had no idea in working there that he was committing a trespass.

Paul Gerber, Jacobus Johannes Barnard, Hendrik Lawrence, and Andries Zeelie having given evidence,

Mr. Barrington, re-examined by the Court, pointed out that the "plaats" so frequently mentioned was situated to the left of the photograph produced, and had been denuded of timber by the defendant. The "plaats" claimed by the defendant was ordinary veld and extended four or five miles.

The Court having been addressed by counsel, the Chief Justice said the first question in this case was, what was meant by the "nek of the plaats." The Court was quite satisfied that the "nek of the plaats" was the one contended for by the plaintiff, as it was a pronounced feature in the landscape. He was satisfied that the plaintiff himself must have understood that the "nek" he contended for was the one meant. The only difficulty he had experienced in this case was the very great difficulty as to whether the defendant understood what particular "nek" was meant; but on the whole he had come to the conclusion that all

the circumstances pointed to the defendant being also of the same opinion as the plaintiff. From the evidence of both plaintiff and Robinson, the Court was perfectly satisfied that before defendant went to Robinson a plan had been drawn and explained to him. That being so, the Court disbelieved him on one important point, and this also threw a doubt on the rest of his evidence. He certainly believed the evidence of the plaintiff when it was stated that the defendant pointed out to his workmen the line cut by Prinsloo as the one to be adopted. He was satisfied that the defendant knew that the line claimed by the plaintiff was the one to be adopted. Another point was that the defendant himself said that the part of the forest in dispute was the most valuable portion, and it seemed improbable that he should have left the most valuable portion till the end. According to the usual practice of wood-cutters, this part would have been selected first. In favour of the defendant it might be stated that it would be extremely improbable that he would have taken upon himself to cut down wood in this particular forest, knowing that at any moment Barrington might swoop down upon him. The witnesses for the plaintiff had made a far more favourable impression on his mind than those for the defendant, but on the whole he believed that the plaintiff had made out his case, and was entitled to judgment with costs. If he kept the wood, which was valued at £81, he should have judgment for £50 damages and costs. He would like to hear from Mr. Schreiner whether his client would elect to take the wood, because if he did so, it would affect the question of damages.

After consultation, Mr. Schreiner said that his client would prefer to abandon the timber cut down to the plaintiff.

Judgment was then formally entered for £50 damages and costs, the plaintiff to retain possession of the timber.

Their Lordships concurred.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

TUESDAY, NOVEMBER 24.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

SHAWE V. HONEYBORNE.

De lunatico inquirendo.

Mr. Molteno appeared for the plaintiff, and Mr. Shiel for the defendant.

This was an action to have John Alfred Honeyborne, aged twenty-six, declared of unsound mind, and for the appointment of a curator of his person and property.

Mrs. A. E. Shawe stated that the defendant was her brother, and that he had resided with her for a year. He was not a lunatic, but was weak-minded, having been born so. He was also paralysed in his right leg and arm, and quite helpless. About six years ago he spent several months in the Old Somerset Hospital. He had inherited money both from his mother and father. Mr. George Brittain was appointed trustee of the money he had inherited from his father, and that from his mother was absolutely free. Witness was anxious to be appointed to look after the property in conjunction with her husband.

Cross-examined by Mr. Shiel: Her brother was not a lunatic. He had been sent to the Old Somerset Hospital because his mother thought he would be better looked after in that institution than at home.

Dr. Julius Petersen (examined) stated: He had visited the defendant some weeks ago and found him mentally and physically weak, in fact an idiot. He was not fit to take care either of his property or person, and there was no chance of recovery.

Cross-examined by Mr. Shiel: Defendant's inability to look after himself was due to paralysis. He was very weak-minded. He (witness) would draw no distinction between idiocy and lunacy.

Dr. F. Fismer expressed a similar opinion.

Mr. H. B. Shaw, brother-in-law of the defendant, stated that the total amount of the money the defendant had inherited was about £500, bringing in some £22 per annum interest. The expense of keeping the defendant came to about £4 per month.

Mr. Shiel said that in discharge of his duty as *curator ad litem* he had visited the defendant on two occasions; and although he had found his condition similar to that described by the medical witnesses, still the defendant did not appear to be a lunatic. His memory was fairly clear on some subjects, and his conversation was coherent. He

did, however, appear to be weak-minded, and clearly could not look after his person or property. He (Mr. Shiel) did not feel justified in consenting to the defendant being declared of unsound mind. At the same time he was of opinion that the defendant required some one to look after his person and property.

The Court declared that the defendant was unfit to take care of his person and property and that Mr. Shaw should be appointed curator of the same, the sum of £4 to be paid monthly for his support and maintenance, this sum to be paid out of the interest of defendant's money, and any deficiency out of the capital inherited from his mother and which was in the hands of the Master.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

HATCH V. HATCH.

Marriage—Nullity—*Prima facie* evidence that defendant's husband by a former marriage was alive when she married plaintiff—*Bona fides* of both parties—Ante-nuptial contract—Deed of separation—Custody of child issue of second marriage—Maintenance.

Sir T. Upington, Q.C., for plaintiff, and Mr. Schreiner for defendant.

This was an action to set aside the marriage on the ground that defendant's husband, C. A. Tadman, was alive at the time she married the plaintiff. Further claims were made for the setting aside of the ante-nuptial contract and a subsequent deed of separation, the restoration of certain property, and payment of certain debts. The defendant admitted her marriage with Tadman, but stated that she had married Hatch *bona fide* believing that Tadman was dead, from a letter she had received to that effect from Tadman's sister. She claimed the custody of the child born while she was living with Hatch, admitted the ante-nuptial contract, the deed of separation, and debt, which she was willing to pay.

Mr. G. Hatch, the plaintiff, stated that he was carrying on business as an outfitter in Adderley-street, Cape Town, and that he was married to the defendant in 1886, believing her to be a widow. She told him that Tadman died in prison at Chatham. He made the acquaintance of the defendant in Port Elizabeth, where he himself was carrying on business, and where she was employed in a drapery store. The separation took place in March of the present year, and since then he had paid her £8 per month. About five months ago he heard that Tadman was alive, and he made inquiries which confirmed the report.

Pressed by Mr. Schreiner to forego his monetary claims witness distinctly declined.

Mrs. M. A. L. Hatch, the defendant, stated that she was married to Tadman in 1879, left him in 1882, saw him in 1884 at Aliwal North, and since then had never seen him. In 1885 she received a letter saying he was dead. The letter purported to be written by Mrs. Loft, a sister of Tadman's, and she received it by post in the ordinary way. The child by her former marriage was at Zonnebloem College, and was not supported by her. She wished to keep the child by the latter marriage herself. The little girl, who was five years of age, was quite happy with her, and did not wish to live with her father.

After counsel had addressed the Court, the Chief Justice said they were satisfied that there was *prima-facie* evidence that Mr. Tadman was alive at the time of the defendant's marriage with plaintiff, but they were also satisfied that the defendant believed him to be dead at that time. Under the circumstances, the plaintiff ought to be reasonable, and they would suggest the payment to the defendant of a lump sum for the support of the child, which she was clearly entitled to keep.

After discussion, the Court declared that the ante-nuptial contract, the marriage, and the deed of separation were null and void, that the defendant was entitled to the custody of the child, and that the plaintiff should pay the sum of £100 in lieu of maintenance, plaintiff to pay his own costs.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne; Defendant's Attorneys, D. Tennant, jr.]

WATSON V. BURCHELL'S EXECUTORS.

Marriage in community—Will—Disposition of entire estate—Specific legacy—Abatement—*Jus accrescendi*—Alleged renunciation of rights by acquiescence—Declaration of rights.

Where a spouse married in community of property had disposed of the entire estate by will to the prejudice of his wife, who was ignorant of her rights, and who was not proved to have elected to abide by the will, the Court held her entitled to half of the joint estate, and in consequence ordered the abatement of a specific legacy left by the will.

Per De Villiers, C. J.—*No doctrine is better settled in our law than that a person cannot*

be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them.

Mr. Schreiner and Mr. Watermeyer appeared for the plaintiff, and Sir Thomas Upington, Q.C., and Mr. Shiel for the defendants.

This was an action instituted by Mrs. Annie Violet Sophia Watson against her father-in-law and brothers-in-law, joint executors with herself under the will of her late husband, Mr. James M. C. Burchell, of the farm Duine, district of Port Elizabeth, to have it declared that she was entitled to one-half of the joint estate of her late husband and herself, by virtue of her marriage to him in community of property.

The testator who died on the 14th March, 1889, by his will bequeathed all his landed property, stock, and other movables to his children, with the proviso that his parents should have the usufruct of the same free of all rent and taxes. To his brothers and sisters he bequeathed a specific legacy of £13,480 invested in English consols after the death of his parents, who were to enjoy the interest on the same during their lives. He appointed his wife and children residuary legatees, besides giving them a legacy of £300 a year. He appointed his father, two of his brothers, and his wife sole executors under his will, and guardians of his minor children and heirs. The wife accepted the benefits under the will, and continued to act as executrix until April of the present year, when she appears to have been advised that she had not received her proper share under the will. She then claimed from the executors one-half of the entire estate of her late husband, and on their declining to accede to her request she took the present proceedings, in which she claimed, *inter alia*, in her declaration:

(*a*) That she was entitled in her personal capacity and by virtue of her marriage with community of goods to her late husband to one-half of the entire joint estate.

(*b*) That she and her children were entitled to receive annually out of her husband's estate the sum of £300, in terms of his will, for the education of her children and the support of herself and her children, such sum to be paid until the youngest of the said children should attain majority.

(*c*) That she and her children were entitled to the residue of the testator's estate in equal shares, she being bound to secure the capital of her share to her children in equal shares by passing a "kinderbewys" in their favour.

(*d*) That she was entitled to recover from her father-in-law the amount received by him by way of income on that half of the £13,480 to which she was entitled by virtue of her marriage with community of goods to the testator

The defendants specially pleaded that:

(*a*) On the death of her late husband, and before her remarriage, the plaintiff elected and agreed (as she lawfully might do) to abide in all respects by the provisions of the said will, and that she assisted in liquidating the estate in manner provided by the will.

(*b*) That she further accepted the benefits conferred upon her by the said will in full satisfaction of all claim which she might have by virtue of marriage or otherwise against the joint estate of herself and her said late husband, and that she waived and abandoned, with knowledge of her position (as she lawfully might do), every right now claimed in her declaration

Upon these facts and pleadings issue was joined.

Annie Violet Sophia Watson (born Daniells) deposed that she was married by ante-nuptial contract to Thomas Watson on the 1st July, 1891. She was previously married to Burchell, by whom she had three children. There was no ante-nuptial contract. In March, 1889, her first husband met with a gun accident, and when she arrived in the bed-room he was just expiring. She was not present when he made his will. Mr. O'Brien came out and took an inventory of the estate. She did not know what she had to receive from her husband's estate, and she never waived her claim to her share in her husband's estate. Mr. Burchell's father made himself unpleasant by threatening to turn her parents off the farm, and she then went to Innes & Elliott and made enquiries as to whether she had any share in the joint estate. She never signed any document resigning her share of the estate.

Cross-examined: She brought no money into the estate. When O'Brien arrived, on the day of the accident, she was on the stoep, but she did not know that he came to make her husband's will. On the day the inventory was taken, O'Brien read the will, but she was so agitated that she did not gather what he said. O'Brien never drew her attention specifically to the conditions of the will. All the Burchell family were present on that occasion. She was acquainted with Mr. and Mrs. E. Norton, of Port Elizabeth, and remembered Mrs. Norton showing her a Port Elizabeth newspaper containing a copy of her late husband's will She never said she was entitled to more money under the will, nor did she remember meeting Norton opposite the Port Elizabeth Customs-house and speaking about the will. She never had any conversation with Mrs. Burchell on the subject of her late husband's will, until she had visited Innes & Elliott. She was on affectionate terms with the Burchells, but there were occasional disagreements. She held no conversation with Miss Minnie McClellan regarding the will of her husband. When her brother was married the Burchells came to the wedding, but the will was

not mentioned. Her mother never spoke to her at Walmer as to the wife's right under a will. She knew a Mr. Kemsley, of Port Elizabeth, but never asked that the accounts might be shown to him. She addressed letters to Mr. Clayton, in London.

For the defence was called Maria Petronella Burchell, mother-in-law of the last witness who deposed that at the time of his death her late son and his wife were on the most friendly terms with the family. On the day of her son's death O'Brien came to make the will, and about twelve days after he came to read the will. It was read out distinctly, and the widow expressed no dissatisfaction. In April the widow raised a complaint, and witness reproached her for going against the dying words of her late husband. The reply was that she knew by law that she was entitled to the half.

Edward Norton deposed that he knew Mrs. Watson. Shortly after the accident she called at his house at Port Elizabeth, and a conversation took place on the subject. She said that the will was a very unfair one, as by right no man could give away more than half of his property. She told him that if the Burchell family was not careful she would make it hard for them.

Ingatius Burchell deposed that at a conversation which took place at his house Mrs. Daniells said it was a good thing that a will had been made, as otherwise everything would have had to be sold. She further said that a man could not make a will without his wife's consent. Mr. Daniells came in during the conversation, and said his wife was correct in her conclusions. The plaintiff always had an opportunity of perusing the accounts, and when she expressed dissatisfaction he took her to Mr. J. C. Kemsley.

By the Court: He understood that Mrs. Watson claimed one-half of the estate.

Minnie McClellan deposed that she lived at Kraggakamma, and knew Mrs. Watson. She remembered meeting her shortly after her husband's death. There was a talk about the will, when the plaintiff said a very fair will was made, and that she and the children were well provided for. During the present year she met her again, on the occasion of her brother's marriage at Port Elizabeth, when the matter was again discussed.

Cross-examined: She volunteered to give her evidence, as she thought it was her duty to do so. There had been no quarrel between her and Mrs Watson.

Frederick Burchell deposed to hearing Mrs. Daniells say that the will was not complete unless it bore the wife's signature, and that what belonged to the husband belonged to the wife. James Daniells, plaintiff's brother, observed that it was shameful that such a discussion should arise so soon after his (witness's) brother's death.

Thomas O'Brien deposed that he drew up the will of the late Burchell, whom he had known for two or three years. He did not give the matter a thought as to whether the man and wife were married in community or not. The man was bleeding to death and he drew up the will, which he read aloud in the presence of the plaintiff. He heard of no dispute until the letter was received from Innes & Elliott. When he went out to take the inventory he read the will loudly to all present, including the plaintiff, who subsequently expressed her satisfaction with the terms of the will.

Mr. Schreiner: The plaintiff is entitled to half of the joint estate. She has not elected to abide by the will. Counsel referred to *Morstert's case.*

Sir T. Upington contended that the plaintiff had accepted the benefits given to her under the will; further, that she had personally administered the estate under the terms of the will; and now between March, 1889, and April, 1891, she took up a fresh position, and claimed one-half of the estate. The legacy to the testator's brothers and sisters was specific and if the Court should hold that the plaintiff was entitled to half of the joint estate the residue should be applied in making up the specific legacy *(Roper on Legacies).*

SUPREME COURT.

WEDNESDAY, NOVEMBER 25.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

WATSON V. BURCHELL'S EXECUTORS.

Mr. Schreiner and Mr. Watermeyer appeared for the plaintiff, and Sir T. Upington, Q.C., and Mr. Shiel for the defendants.

The arguments in this case being concluded, the Court delivered judgment as follows:

The Chief Justice said: This case differs from the numerous class of cases in which one of two spouses after the death of the other claims his or her share of the community in opposition to the provisions of a mutual will made by them. The testator in the present case ignored his wife altogether, and alone purported to dispose of their joint property, as if no community existed between them. She also appears to have been ignorant of her rights, and raised no objection either to the will or to the accounts framed in pursuance of the will until two years had elapsed after her husband's death. Under none of these accounts, however, was any benefit awarded to her

beyond what she would have been entitled to by virtue of the community. The defence to her claim for her share of the common estate is in substance that she has renounced her right, but no doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them. I am satisfied that until April of this year, when the plaintiff was informed by her attorneys of her true legal position, she was not aware of the exact nature of her rights, and that in acquiescing in the accounts submitted to her for signature she had no idea of surrendering rights to which she was legally entitled. The plaintiff's rights extend to every portion of the common estate. The testator had no right therefore to dispose of more than one-half share of his farms or more than one-half of the consolidated stock standing in his name. But on behalf of the defendants it has been contended that the legatees of the stock, if not of the farms, are entitled to the full benefit of their legacies, and that if half of the stock is not given to them the residue of the estate must make up the deficiency. No direct authority on this point, has been cited on either side, but it will be found that the question is fully discussed by *Voet* in *Book 30, tit. 28*, and the writers referred to by him. He points out the difference between the legacy of a thing which does not belong to the testator at all and the legacy of a thing of which he is tenant in common with another. In the latter case he holds that the legatee, in case of doubt, is entitled only to the share which belonged to the testator, and he adds, apparently with approval, that according to some, the same rule of construction applies where a spouse bequeaths a thing which forms part of the common estate of himself and the other spouse. I would here also refer to "Van der Merwe v. Executors of Van der Merwe" (Buch. 77, p. 89). The result, therefore, is that the plaintiff must be declared to be entitled to one half share of the entire joint estate of the testator and herself. Having elected, however, to claim her half share, she cannot obtain any benefit under the will out of the testator's half share. As to that half share, the specific legacies must be reduced by one-half. In regard to the legacy of £300 per annum to the plaintiff and the testater's children for their education and support, the plaintiff cannot of course share in it, and the question remains whether her share lapses or accrues for the benefit of her co-legatees. In my opinion the right of survivorship exists not only because the legatees are joined together as objects of the testator's bounty, but because it is a fair inference from the language employed by the testator that if one of the legatees should be incapable of taking his share his co-legatees should have the benefit of it. The same remark applies to the legacy of the residue which will go to the children of the testator. The Court will therefore declare that in her individual capacity the plaintiff is entitled to one-half share of the common estate of herself and the testator, and that her minor children are entitled to the annual sum of £300 (if there is sufficient in the estate after payment of half the specific legacies), as also to the residue of the estate. The accounts to be amended accordingly, but no past payments of interest to be opened up. Costs out of joint estate.

Mr. Justice Smith concurred, and said that the only observation he wished to make was that during the argument it did not seem quite clear whether, in addition to the half of the property, the wife was not entitled to some benefit from the specific legacies. However, Mr. Schreiner had not made a point of it, and therefore it was not necessary to make further comment.

Mr Justice Buchanan also concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendants' Attorneys, G. Montgomery-Walker.]

WILSON V. SHAW.

Pledge in the nature of sale.

Where goods, the property of a wife married out of community, had been pledged by her husband without her authority, and subsequently sold by the pledgee without having obtained a judgment, the Court ordered the pledgee to deliver the goods; or failing delivery; to pay their value less the sum advanced by him on the same.

Mr. Juta, and Mr. McLachlan, for plaintiff; Sir T. Upington, Q.C., and Mr. Shiel, for defendant.

This was an action instituted by Mrs. Wilson, duly assisted by her husband, to whom she was married by ante-nuptial contract, to recover from the defendant, a law-agent residing in Cape Town, the delivering up of certain jewellery and other articles, upon which a loan had been obtained by plaintiff's husband to the amount of £10 without her consent. The articles were valued at £90 by plaintiff. The defence was that the defendant had bought the articles from plaintiff and her husband for the sum of £10, and that they were not now in his possession. The issue was whether there had been an out-and-out sale to defendant without the authority of plaintiff, or whether the goods were handed to the defendant in the first

instance to be taken care of, and after that £10 obtained upon them, they remaining in defendant's hands as security, The plaintiff's contention was that she should either have the goods back, or their full value.

Mary Wilson deposed that she was married to Thomas Hamilton Wilson in Scotland by ante-nuptial contract. Last year defendant was acting as her husband's agent. In March, 1890, they were living in Roeland-street, and her husband was in pecuniary difficulties. Defendant came to their house one evening, and said if she had anything she would like to keep he would take care of it until things became more settled. She replied that she did not see the necessity of such a course, as what she had was her own personal property. Defendant's reply was that it was best to be on the safe side. She then went upstairs and handed over to him her jewellery, the bulk of which she had before marriage. At the time they had no money to pay for their board, and her husband went todefendant to try and raise £10. He went and returned with a paper, which set forth that the goods had been sold for £10 to defendant, but she refused to sign it. No money could buy some of the things, which were family relics. Her husband went away, and came back with £10, but she never at any time authorised him to sell her jewellery. She always thought defendant kept the things until such time as the troubles blew over. Some time afterwards they came into possession of some money, and tendered the defendant the £10, when defendant said he had no goods belonging to Mrs. Wilson in his hands. She denied that she had ever given anybody authority to sell her jewellery.

Cross-examined: Defendant was an intimate friend of theirs. At the time the jewellery was handed over, there was an attachment in the house against her husband's property. She did not remember seeing the bill of sale. She believed her husband incapable of forging her name or disposing of her property without her consent. Defendant never asked her whether she would buy the articles back at the same price. She knew that her husband got £10 from defendant; nothing was said about interest in her presence.

Re-examined: Her husband was expecting an inheritance from Scotland, and defendant was acting as his agent.

Thomas Hamilton Wilson deposed that the original value of the jewellery was about £90, but was now worth a third less. Defendant had been acting for him in various capacities. As he wanted money, he went to defendant, and asked him to advance £10. After some conversation with him and his clerk, Eaton, a document was handed to him for his wife and himself to sign. His wife refused to sign it, but he was persuaded to do so, defendant saying that it was only a matter of form, as he did not hold a pawnbroker's licence. Neither his wife nor himself was aware that an out-and-out sale had been effected. When he received money from Home he went to defendant and offered him £10 for the jewellery, whereupon he said he had disposed of it for £9 17s. 6d. Witness remarked that it was a fine thing to sell £90 worth of jewellery for such a paltry sum.

Cross-examined: He asked defendant to be lenient in the matter of interest on the £10. Between the 22nd March and the 11th April he did not have the document in his possession. He was not surprised at anything he heard now-a-days.

Sir T. Upington: I suppose you do not attach much weight to any of us.

Witness: I attach as much weight to you as you do to me.

By the Court: When he got the money from defendant he presented him with a nugget pin and four law-books.

For the defence was called William Bunting Shaw, who deposed that in March, 1890, he was on intimate terms with the Wilsons. On one occasion he went to their house, and found that the goods had been attached for rent. He offered to take care of plaintiff's jewellery, and it was handed to him. A few days afterwards Wilson asked him to lend him £10 on the security of the jewellery. He declined, but offered to buy the jewellery out and out for £10. This Wilson agreed to, and the document produced was drawn up and signed. Witness then drew a cheque for the money. Shortly afterwards he saw plaintiff, and she thanked him for what he had done. He told Wilson that he would keep the things for a time, and if he wanted them back he could get them for £10. In February he sold the things, with others of his own, to Jacobsohn for £17, with the exception of a pair of nugget earrings. At the time he was hard pushed, and was anxious to get as much money as possible.

Cross-examined: He received a power of attorney from Wilson authorising him to get the money coming from Scotland, but the power was afterwards revoked.

By the Court: He purchased the jewellery for himself, fully expecting that it would be bought back. On the 28rd March he told Wilson that he could redeem the jewellery within a reasonable time.

Francis Alexander Eaton deposed that he was clerk to defendant in March and April, 1890. He drew up the document produced, and told Wilson that it was a deed of sale. After some delay Wilson signed the document, and received the £10. Wilson said the money was only a loan, and he would repay it to defendant in a few days.

Samuel Jacobsohn deposed that he purchased a quantity of jewellery from Shaw, and paid him the sum of £17, which he considered to be a very

fair price. The electro-plated tea set, valued by plaintiff at £10, was worth about £2. He sold it some time ago, but did not remember what he got for it. He had several of the articles still in his possession, and was likely to have them for a very long time. Some of the jewellery contained spurious diamonds. The rings produced were worth from 2s. to 4s. each. He valued the gold albert chain at £7, and a crocodile skin cigar-case at 10s. The "gold-headed scent-bottle, with monogram," valued at £2, was worth 8s. There was no gold about it. He bought several rings, valued at £9; they were worth 8s. to 4s. each. The brooches produced were of small value; probably about 8s. or 10s. each. The parcel of jewellery would not fetch £90 in Cape Town; it might in California. The nugget earring, set down at £5, he valued at about 10s.

Cross-examined: He had sold the most valuable portion of the property. The presence of the monogram on the scent bottle detracted from its value when offered for sale. He did not know what the price would be in Adderley-street; he knew what the value of the goods were. The tea-service was composed of electro-plated pewter.

Mark Ringham deposed that he went to defendant's house to examine some second-hand jewellery which was on sale. Defendant asked him what he would give for it and he offered £5 for the lot. This was refused, as defendant wanted £10.

Joseph Aloysius Carroll, messenger of the Court, deposed to serving an interdict on Wilson on the 19th March last year. If he had known there was any jewellery in the house he would have attached it, as there were several judgments against Wilson. Some of the articles attached were subsequently claimed by other persons.

After argument, the Chief Justice said the Court was perfectly satisfied that there was a certain written document by which the articles in question were to be merely pledged, and not sold. The evidence of Shaw on this point was not quite satisfactory. In the first part of his evidence he seemed to deny altogether that it was not in the nature of a pledge, but afterwards when pressed he admitted that the day after the transaction went through it was understood between the parties that in a month's time, if the plaintiff paid the money, the goods would be returned to her. Further pressed on this point, he said that as far back as the 23rd March it was also understood between them. It being once admitted that this transaction was really in the nature of a pledge, the Court could not look with approval on the matter. It was clear that the pledgee had no authority to sell without first obtaining a judgment of the Court. Another point in favour of the plaintiff was this—in his opinion she never authorised her husband to sell these articles; all she authorised him to do was to pledge them. This was what he really did, being under the impression that the deed of sale was a mere matter of form. It was clearly understood between the parties that the things were to be pledged and not sold. The defendant went to Ringham with the articles, where he was offered the sum of £5. He next proceeded to see Jacobsohn with the goods, supplemented by some articles of his own, and it appeared that Jacobsohn paid him something like £10 for the parcel placed in his hands by the plaintiff. Jacobsohn was a dealer in these goods, and bought goods very cheaply. He thought the price paid by him for these articles was not a fair criterion. The plaintiff's value of the goods was, however, extravagant. Bearing in mind that Jacobsohn paid £10, he thought the Court might fairly add another £10 to the value, and that would be a fair criterion of their true value when they were pledged. In his opinion, therefore, the plaintiff was entitled to recover these articles on payment of £10, with interest from the 11th April, 1890; but inasmuch as the defendant was not in a position to re-deliver the articles, the plaintiff was entitled to judgment for £20, less the £10 and interest above mentioned. He confessed that the real difficulty he had to deal with in this case was the question of costs. It struck him that this case might fairly have been decided in the Magistrate's Court, instead of occupying the time of this Court nearly the whole of the day. There was, however, an important principle involved in the case, and seeing that the defendant, as a law-agent, should have known that he should not have taken the law into his own hands; judgment would be for plaintiff for £20 and costs, less £10 and interest from the 11th April, 1890.

[Plaintiff's Attorney, H. P. du Preez; Defendant's Attorney, J. Hamilton-Walker.]

KNOX V. KNOX.

Mr. Castens for plaintiff; defendant (Cecilia Smythe Knox, born Hyslop) in default. This was an action instituted for the restitution of conjugal rights. The parties were married in 1866 at Edinburgh, and came to this colony in 1879. During the month of October, 1888, the defendant suddenly went away to England, and the plaintiff sent her money to pay her return passage. She returned to the Colony, and in July, 1890, she again went away suddenly. The plaintiff then consulted an attorney, and commenced proceedings. Personal service of the summons had been made upon the defendant in England. There were no children by the marriage.

The Court ordered the defendant to return to her husband before the 15th February next, failing which, a decree of divorce would be granted.

PETITION OF IDA MOSS.

Mr. Shiel moved for leave to sue by edictal citation in an action against petitioner's husband, Henry Charles Moss, for divorce by reason of his adultery and cruelty, and for the custody of the two minor children.

The Court granted leave to sue by edictal citation, rule returnable on the first day of next term, personal service if possible, failing which, one insertion in one of the Cape papers.

TRUTER V. TRUTER.

Mr. Watermeyer moved for an order making absolute the rule *nisi* for the dissolution of the marriage between the parties by reason of the respondent's failure to obey the order for restitution of conjugal rights; to give the custody of the children to the applicant, their mother; for division of the joint estate; and for an order restraining the alienation of certain reversionary interest to devolve on the respondent at the death of his mother. Mr. Watermeyer said there was another motion, which had stood over, praying for the appointment of a receiver in the joint estate.

The Court granted the order, and appointed Mr. B. Wethmar, secretary of the Malmesbury Board of Executors, receiver, to divide the common estate of the plaintiff and defendant; to pay half of the proceeds to the plaintiff, the costs of this motion to come out of the other half.

LAWLEY V. CAPE TOWN COUNCIL. BRUCE V. CAPE TOWN COUNCIL.

Cape Town Council—Act 44 of 1882—Municipal Regulations—Regulation 205—"Obstructions and projections"—*Ultra vires*—Property in street pavements—Interdict—Rule *nisi* discharged.

Mr. Juta (for Lawley) applied for an order makinga bsolute the rule *nisi* for an interdict restraining the respondents from removing the signboard in front of the applicant's premises in Longmarket-street, Cape Town.—Sir T. Upington appeared for the Town Council.

Mr. Searle moved for an interdict restraining respondents from removing or interfering with a sign erected by Bruce in front of the premises occupied by him in Adderley-street, Cape Town, on the ground that such sign was erected with respondents' consent, that it was neither a source of danger nor a nuisance, and that the regulations requiring its removal were unreasonable and unauthorised by Act 44 of 1882.

Sir T. Upington also appeared in this case for the Town Council, and moved that the rule *nisi* granted in the case of Lawley be discharged, on the ground that the Council were acting quite within the scope of their authority in proceeding as they did, under the 205th regulation, promulgated on the 29th May, 1889. It was not at all *ultra vires* to make such a regulation. In the case of Bruce the principle was exactly the same.

Mr. Juta said without any reason assigned his clients were ordered to take down their signboards. Consent had been given, and the signboard had been in existence for forty years. There was nothing which authorised the Town Council to remove private property. If the Town Council had the right to remove a man's signboard, on the same principle they could remove a main stoep if it was an obstruction to the thoroughfare. He contended that there was no such power under the Act.

Mr. Searle said that the only section under which the Town Council could claim to act was section 69, which dealt with questions affecting he health or peace and quietness of the inhabitants. No complaint on this score had been made regarding the signboard of Messrs. Bruce & Co. He did not think it was right that, after consent had been given, at the whim of the Town Council a tradesman should be compelled to remove a costly signboard.

SUPREME COURT.

THURSDAY, NOVEMBER 26.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

LAWLEY V. CAPE TOWN COUNCIL.—BRUCE V. THE SAME.

The hearing of these applications was resumed; Mr. Juta appearing for Lawley, Mr. Searle for Bruce, and Sir T. Upington, Q.C., for the Town Council.

Sir T. Upington quoted a proclamation of June 24, 1811, defining the district of Cape Town and the duties of the Town Council, and said that whatever the Burgher Senate possessed was now the property of the Town Council as clearly as if it had been made over by formal transfer.

Mr. Justice Smith asked why the streets were not specifically mentioned as the property of the Town Council.

Sir T. Upington said that everything was included as belonging to the Council,

The Chief Justice said that if the streets were not under the control of the Town Council, and possessed by that body, it was difficult to understand to whom they did belong.

The Chief Justice gave judgment. In doing so, his lordship said that in both these applications the Court was asked to interdict the Town Council from enforcing the provisions of the 205th regulation, the latter portion of which referred to these cases. It was not denied, on behalf of the Town Council, that the obstructions or projections now in question were lawfully made, and there was no objection on the part of the Town Council to make reasonable compensation to both of the applicants for any damage they might suffer by reason of the removal or alteration of these obstructions. The question of compensation, therefore, did not enter into the present case. He did not think it was necessary for the Town Council to have tendered any fixed amount of compensation at the time when notice of removal was given. The Town Council had been quite prepared to pay any compensation which might be reasonably allowed, and therefore that part of the question had no concern with the present case. The real question was whether the regulation was *ultra vires* on the part of the Town Council. Now it had to be borne in mind that regulations had existed as far back as 1840 by which the Town Council—the Municipalities which were the predecessors of the Town Council and also the present Council—had control over the streets and all projections made over the said streets, and it was difficult to conceive any municipality existing without some control over the projections or the streets over which it must have lawful control. The question had incidentally arisen in the present case whether the property in the pavements of the streets was vested in the Town Council. He was inclined to think it was, but whether that were so or not the Council had Municipal control over the pavements of the streets, and in his opinion that control carried with it control over all projections overhanging the streets. It was quite within the power of the Council to make regulations regarding those projections. For over fifty years regulations had existed giving control to the Municipality, and the power to refuse or consent to these projections being made. In the case of Lawley, it was stated on behalf of the applicant, first, that he had got the consent of the Council, and secondly, that he had acquired his rights by prescription. The two statements, it was clear, were inconsistent, If the signboard were placed there with consent, then clearly there was no right by prescription. In the case of Bruce & Co., it was stated, and not denied, that there was an actual consent given by the Town Council, but in his opinion that consent was quite revocable, and not binding upon any Council succeeding the one that granted it. The Council had the right to say whether the licence once given was to be continued or not, and he might remark on that point that the Council's regulation seemed a very fair one, because it said that where signboards had been erected with permission they should not be removed without reasonable compensation. In his opinion it was perfectly within the power of the Council to make and carry out the regulation, and the applicants had no right by interdict, or at all events by summary motion, to prevent the Council from exercising its powers. Under those circumstances he thought that in the case of Lawley the rule must be discharged with costs, and in the case of Bruce the application must be refused with costs.

Their lordships concurred.

The Chief Justice added that in the case of Bruce the letter of the 2nd November, written by the Town Council, contained a very fair offer to the applicant.

[Attorneys for the Town Council, Messrs. Fairbridge & Arderne; Attorneys for Lawley, W. E. Moore; Attorneys for Bruce, Messrs. Scanlen and Syfret.]

PROVISIONAL ROLL.

GERMAN WEST AFRICAN COMPANY V. HANSEN.

Mr. Juta applied for final adjudication of the defendant's estate, the provisional order having been granted on November 20.

Defendant appeared in person, and said he had a counter claim against the plaintiffs.

The Chief Justice examined the documents handed up by the defendant, and adjourned the case for the production of the records of the Resident Magistrate's Court.

At a subsequent stage of the sitting,

Mr. Juta produced the records of the Resident Magistrate's Court, which were to the effect that defendant had admitted the debt,

The Court granted the order of adjudication as prayed.

GENERAL ESTATE AND ORPHAN CHAMBER V. OCTOBER.

Mr. Thorne moved for provisional sentence upon a mortgage bond for £150, with interest at 7 per cent. from June 30, 1890.

Provisional sentence was granted, and the property declared executable.

CORNWELL AND CO. V. A. G. GILL.

Mr. Watermeyer moved for provisional judgment for £7 12s. 9d.

The order was granted as prayed.

KING BROS. V. JOHANNES WAHL.

Mr. Molteno moved for judgment for £88 10s. 6d., on an account current between the parties. Provisional judgment was granted.

GENERAL MOTIONS.

CAPORN V. MARRIOTT.

Partnership — Disagreement of partners — Notice of dissolution—Deed of partnership —Right of election—Receiver.

Where partners had disagreed, and one partner had given notice of dissolution, the Court, on the application of the latter, appointed a receiver until the other partner should elect whether he would or would not purchase the share of the applicant in the business, and failing such election within three months from the date when the value of the assets had been ascertained in terms of the deed, authorized the receiver to finally liquidate the affairs of the partnership.

Mr. Schreiner moved for an order appointing a receiver to take charge of and conduct the partnership business of applicant and respondent, pending the ascertainment of petitioner's interest therein on the dissolution of the firm. Counsel read affidavits to the effect that the partnership was entered into in 1888, and made terminable after six months' notice. Applicant was dissatisfied with the manner in which respondent had behaved, and particularly with the way in which he had kept the books of the firm. These were in arrear, and would require some weeks to write up. There had been very serious disagreements between the parties, terminating recently in an assault committed on applicant by respondent. The stock was valued at over £4,000, and the outstandings between £500 and £600. Counsel stated that by a provision of the partnership deed it was laid down that if either of the partners retired he could be treated as a dead man, even though he were alive, and the remaining partner had three months' time in which to make up his mind as to the course he would adopt. Notice had been served on Marriott by applicant, and the partnership would cease on November 27, when Caporn's position would be greatly prejudiced if respondent were allowed to remain in sole possession of the business, and to take three months to decide what he would do. Under these circumstances applicant prayed for the appointment of Mr. E. R. Syfret as receiver, costs to be paid out of the estate.

Mr. Searle appeared for the respondent, and opposed the petition. He read an affidavit of respondent to the effect that he was prepared to act in accordance with the terms of the partnership deed. He denied that the books were in an involved state, and said that the true reason why applicant desired a dissolution of the partnership was that respondent had refused to appoint a brother of Caporn's the English agent of the firm.

Mr. Justice Smith : What do you propose ?

Mr. Searle : We simply stand by the partnership deed, my lord.

Mr. Schreiner said that the partnership deed had been correctly quoted, but the parties were utterly in disagreement, one of them having been fined for assault upon the other, and unless the Court granted some relief the business might be closed to-morrow, and Caporn's interests tied up for three months whilst respondent was making up his mind The application was most reasonable, and made in the interests of the business.

The Chief Justice: Is there absolutely no chance of a distribution according to the deed without the intervention of the Court?

Mr. Schreiner : Absolutely none, my lord.

After argument,

The Chief Justice gave judgment: This, he said, was not a case in which the Court was asked to appoint a receiver to conduct a going partnership business. The case was one in which one of the partners had given notice of dissolution, which was to take effect to-morrow, and the Court was now asked to appoint a receiver to act impartially between the two parties, who had seriously disagreed between themselves. It was obvious from the affidavits put in that there was no likelihood of these two partners amicably settling matters between themselves, and it was therefore for the interest of both parties that a receiver should be appointed to take charge of and conduct the partnership business until the respondent should have had an opportunity of electing, in terms of the partnership deed, whether he would or would not purchase applicant's share of the assets. The Court did not propose in any way to vary the terms of the articles of agreement. The respondent was to be entitled to the full benefit of those articles ; he was to be entitled to make his election within the time allowed by the articles, but until he did so make his election the Court was of opinion that there ought to be an impartial person to act for both parties. That power was almost always exercised when it was for the good of both sides that it should be. As soon as respondent had elected to purchase the business the powers of the receiver would fall to the ground. The appointment would only be made till then, but in case the respondent should not exercise his right of purchase within

the three months, then of course the powers of the receiver would become absolute, and he would be entitled to liquidate the business. The order of the Court would be that Mr. E. R. Syfret should be appointed receiver, to take charge of and conduct the partnership business from the date of the dissolution until the respondent should elect, in terms of the deed, whether he would or would not purchase the share of the applicant, and failing such election, within three months from the date when the value of the assets had been ascertained in terms of the deed, Mr. Syfret would be authorised finally to liquidate the affairs of the partnership. The costs would be costs out of the partnership funds.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Respondent's Attorneys Messrs. van Zyl & Buissinne.]

DUNMAN V. TRAUTMANN.

Contract in restraint of trade—Construction—Breach—Goodwill of business—Cession—Alleged misrepresentation—Damages—Interdict.

Mr. Schreiner and Mr. Watermeyer for plaintiff; Mr. Searle and Mr. Molteno for defendant.

This was an action brought by Mr. C. B. Dunman, of Hout's Bay, against Mr. Jacob Trautmann, of the same place. The circumstances of the case were that Trautmann had carried on business at Hout's Bay as a hotelkeeper and general dealer, and on September 12, 1889, an agreement was entered into whereby he sold the hotel business, the shop, and all his interests, together with certain land, to one Bennett. It appeared that Bennett bought some furniture, among other things, but the furniture was not all delivered. A dispute about it arose between Bennett and Trautmann, and Bennett being very desirous to get a special clause regarding Trautmann's promising not to commence business in the district again, arranged the dispute on the basis of an agreement signed on December 4, 1889, by which Trautmann bound himself, under a penalty of £100, not to commence business in the vicinity, or allow his children to do so during his lifetime. Dunman purchased the whole of Bennett's rights, and informed Trautmann of that fact. At the beginning of the present year, counsel stated, Trautmann committed a breach of the agreement by opening a shop at Hout's Bay. It was true that it was in the name of his son, but it was supported by him, and he served there. Plaintiff therefore claimed £100 damages for breach of contract, and an interdict restraining Trautmann from continuing his present course of action.

Defendant, in his plea, denied that the agreement of December, 1889, was read or explained to him, and contended that it was entered into owing to misrepresentation on the part of Bennett and his agent.

Plaintiff gave evidence, in the course of which he stated that he paid Bennett £1,800 for his rights, the agreement with Trautmann being specially mentioned. Since the opening of the present year his business had fallen off very largely, owing to Trautmann's setting up in business. He had seen Trautmann serving customers on several occasions.

By Mr. Searle: It was true that Mrs. Trautmann generally managed the business.

John Thos. Bennett, the vendor to Dunman, stated that it was intended to bind Trautmann by the first agreement not to enter into business in the vicinity, but owing to an accident that clause was omitted. Trautmann was perfectly aware that one of the grounds of purchase was that he should not commence business again in the vicinity. Witness's desire to that effect had been thoroughly and fully explained to Trautmann, in Dutch and English, in the presence of several witnesses, and he distinctly stated that he was thoroughly satisfied with the terms. Witness was not now living at Hout's Bay, and had no interest in this action.

By Mr. Searle: He was certain he had not urged Dunman to bring that action. Dunman had paid almost all the £1,800; only £125 was owing at present. It was not correct that Trautmann did not understand English, but for safety's sake the agreement was also read over to him very slowly in Dutch, and he then signed it.

J. J. D. Buyskes, agent, deposed that he drew up the contract between Bennett and Trautmann, the latter having asked him to dispose of his property. In December, 1889, he met Trautmann in the road, and remarked that he had heard that the dispute with Bennett was settled. Trautmann replied yes, that he was going to Germany, and had surrendered the shop to Bennett, with his rights. On the very day the agreement was signed he caught Trautmann removing some of the furniture, and at once stopped him and told him that in removing furniture sold to Bennett he was committing an act of theft.

By Mr. Searle: When he met Trautmann in the road the latter did not in so many words say that he had agreed to desist from trading at Hout's Bay, but he said that he had given in, and done as Bennett wished.

C. L. Bindemann, agent, deposed that he and Trautmann discussed the agreement of December 4, 1889, very fully, and Trautmann was in particular made to understand that he was not to recommence trading at Hout's Bay. It was Trautmann's own proposal that, as he was going to Germany, he would allow a stipulation against his

opening the shop again to be included in the agreement. Witness handed a copy of the agreement to Trautmann some time afterwards. When the document was drawn up witness read it in English and then explained it in Dutch.

Jacob Brink deposed that he was present when Trautmann signed the contract. It was read over to him, in witness's presence, in English and Dutch.

By the Chief Justice: The agreement was to the effect that Trautmann should not commence trading again.

J. C. Smith stated that on one occasion Trautmann told him that the business now going on at Hout's Bay was his son's, but that he was conducting it for him.

For the defence,

Defendant gave evidence that he handed to Bennett the whole of the furniture included in Buyskes's list. On the occasion when the second agreement was discussed no document was drawn up, but on January 6, 1890, he did sign an agreement. When he signed his name to the second agreement he thought it was a receipt for the goods. Its contents and nature were never explained to him. He had never promised that he would not open a shop in the vicinity, nor had he ever sought to bind his children in the manner suggested by plaintiff. It was not true that Bindemann ever handed him a copy of the agreement. He had no share of the profits of the business now conducted by his son.

By Mr. Schreiner: He never signed any document in the presence of Brink and Bindemann.

Mrs. Johanna Trautmann stated that the takings of the shop were not more than £8 10s. per week, and that it was the property of her son.

SUPREME COURT.

FRIDAY, NOVEMBER 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

DUNMAN V. TRAUTMANN.

The hearing of this action, was resumed. Plaintiff was represented by Mr. Schreiner and Mr. Watermeyer, and defendant by Mr. Searle and Mr. Molteno.

Mr. C. H. Brand, conveyancer, deposed that on one occasion Trautmann, in his presence, refused to part with the shop, which he said belonged to his wife.

The following authorities were referred to in argument: *Voet*, 18, 4, 9, 10; *Sande, de act cess. cap* 5; *Story*, 99; *Pollock* on contracts, 313; *Allan* on the Law of Goodwill, p. 80 and cases there cited; *Hitchhock* v. *Coker*, 6A and E. 438; *Elves* v. *Crofts*, 10 C. B. Reps., 241; *Hastings* and *others* v. *Whitley*, 2 Ex. Reps., 611; *Atkyns* v *Kinnier*, 4 Ex. Reps., 776; *Mumford* v. *Gething*, 7 C.B. (N. S.), 805; *Benwell* v. *Inns*, 24 *Beavan*, 307; *Gowie* v. *The Provident Insurance Co.*, 4 Juta, 118.

The Chief Justice gave judgment. The only real difficulty, he said, throughout the whole of the case had been as to the construction of the contract. On behalf of the plaintiff, it was contended that there was an undertaking on behalf of the defendant not to carry on a business of the same nature as that which he had sold. On behalf of the defendant it was contended that the real contract was of a personal nature, and that there was merely an undertaking not to carry on such a business as the plaintiff was from time to time to carry on. In his opinion, the first construction was the correct one. At the time the contract was entered into Mr. Bennett was not carrying on a business, but defendant bound himself not to conduct a similar business to that he was then selling to Bennett. If that were the true meaning of the contract, it was quite clear that it was not a contract of such a purely personal nature that the benefit of it could not be assigned by Bennett to anyone else. In assigning the good-will of Bennett's business, the benefit of that contract would come into the assignment. The effect of the cession was merely a transfer to Dunman of benefits conferred on Bennett by the contract with Trautmann. There was nothing in the Colonial law to prevent such a cession being effected. That being so, in the present case there had been a clear cession of the contract to the plaintiff, and he was entitled to the benefit of it, unless the special pleas relied on by the defendant were proved. The first plea was that he did not understand the contract. It was clear from the evidence that he must have understood it. When the first contract was read in English he said he did not require a translation into Dutch, as he fully understood it. As to the second contract, they had the evidence of respectable witnesses, who at the time of the second contract heard it read to Trautmann in English and explained in Dutch. He (the Chief Justice) was perfectly satisfied that there had been no misrepresentation. Then there was the further plea that Trautmann had not broken his contract. Well, in his opinion the whole transaction was a mere blind, and the real man who carried on the business was defendant. As he had said, the real point was the construction of the contract, and on that his judgment was against

defendant. At the same time it was clear that the interdict asked for was too wide, there being no allegation that defendant intended recommencing business as a hotelkeeper. Judgment would be for the plaintiff for £10, and an interdict would be granted restraining the defendant during his lifetime, and that of his children, from carrying on, or causing to be carried on, the business of a shopkeeper at Hout's Bay.

Their lordships concurred.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, P. Brink.]

GENERAL MOTIONS.

NESBITT V. NESBITT.

Mr. Webber moved for an order making absolute the rule *nisi* admitting applicant to sue her husband *in forma pauperis* in an action for restitution of conjugal rights, failing which, for dissolution of marriage between the parties.

The order was granted.

IN THE ESTATE OF THE LATE ADAM BARNARD.

Mr. Joubert moved for an order making absolute the rule *nisi* for the registration in the name of the said estate of certain one-fourth share of the farm Wilgeboom, situated in the division of George, at present registered in the name of William A. Botha.

The order was granted.

PETITION OF MARK COHEN.

Mr. Maskew moved for authority to mortgage certain lots of ground situated in Cape Town, purchased in trust for petitioner's minor daughter, of which only a portion of the purchase price is to be paid in cash.

The application was ordered to stand over for further information.

BURN V. BURN.

Mr. Tredgold moved for the direction of the Court as to the service of the rule *nisi* for the dissolution of the marriage between the parties on account of the disappearance of the defendant, who until recently resided in Cape Town.

The order was granted, publication in the *Government Gazette* and the *Oudtshoorn Courant*.

PETITION OF CHARLES WILLIAM LEE.

Mr. Juta moved for an order allowing the petitioner's service as an articled clerk to a solicitor in the City of London to have effect as service in this colony, and for admission as an attorney of this court, after passing such law examination as may be prescribed.

The Chief Justice questioned if there was a single case in which a year's service in the Colony had been dispensed with.

Mr. Juta confessed that he did not remember such a case at the moment, but asked that the matter should be allowed to stand over, when he would look up the cases.

The Chief Justice agreed to that course, and allowed the application to stand over. He doubted, he said, whether the year's service in the Colony could be dispensed with.

PETITION OF W. T. HOOGENDOORN.

Mr. Searle moved for an order making absolute the rule *nisi* for authority to the Registrar of Deeds to amend the description of certain landed property situated in Rose-street, Cape Town, transferred to the petitioner in 1879, by adding thereto a reference to a diagram annexed to a transfer deed of the 15th September, 1801.

The order was granted.

RICHARDS V. RICHARDS.

Mr. Tredgold moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

The order was granted.

In re THE PAARL BANK (IN LIQUIDATION).

Sir T. Upington presented the special report of the official liquidators in respect of the compromise to be effected with the co-liquidator, Mr. J. J. de Villiers, of his liability as a former shareholder of fifteen shares in the said bank. The report was to the effect that Mr. De Villiers was liable to be placed on list B of contributories, namely, that of past shareholders. Ten of the shares were transferred to F. A. E. de Villiers, since deceased, and five to P. B. de Ville. Both of these persons had been excussed, and it was estimated that only £600 was obtainable from one of the parties. The total possible liability upon Mr De Villiers was £3,750, and Mr. De Villiers offered a cash payment of £3,000 to be relieved of all future liabilities in respect of the shares. Mr. De Villiers was one of the liquidators, and his fellow-liquidators were of opinion that the offer should be accepted in the interests of the liquidation. Counsel stated that no list B had yet been published, but Mr. De Villiers had made what was, he submitted, a very fair offer, because he did not wish to have this liability hanging over his head.

The Chief Justice: I suppose he wishes to protect himself from future calls.

Sir T. Upington: I suppose that is the case from his point of view, but the liquidators think it is a case where a bird in the hand is worth two in the bush.

The Chief Justice: Has his name appeared on the list lying for inspection?

Sir T. Upington: No, for the reason that he is simply a person upon whom there is only a contingent liability.

The Chief Justice ordered the special report to lie on the table for a fortnight for inspection, the application at the end of that time to be renewed.

PETITION OF DANIEL J. W. BRUWER AND OTHERS.

Mr. Jones moved to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, 1881, for transfer to petitioners of a portion of the farm Randbergsfontein, situated in the district of Robertson.

The order was granted.

PETITION OF THE CAPE OF GOOD HOPE SAVINGS BANK.

Practice—370th Rule of Court—Revived judgment.

Mr. Schreiner moved for an order authorising the High Sheriff to proceed with a sale in execution, or for other relief, in the estate of F. S. G. Maritz. Counsel referred to the 370th rule of Court, and to "Meyer v. Pohl," 1 Menz., 498.

The Court held that as more than six years had elapsed since judgment (although the writ had been issued) the judgment must be revived, and ordered the sheriff to proceed in the ordinary course.

HERP'S TRUSTEES V. BROWN.

Mr. Schreiner moved for an order confirming the account and plan of distribution filed by the said trustees, and requiring respondent to pay the costs occasioned by his failure to proceed with his objections lodged in respect to the said account.

Mr. Juta appeared for the respondent.

The hearing of the application was postponed till the second Thursday in February.

In re THE CAPE OF GOOD HOPE BANK (IN LIQUIDATION).

Mr. Schreiner presented, for the sanction of the Court, certain compromises proposed to be effected by the liquidators with contributories and debtors. Counsel stated that no objection had been made to the proposed compromises, which were in the interests of the liquidation. Counsel also applied for an extension of the time within which claims could be filed until June 30, 1892. There were a number of persons, it was explained, who through ignorance or inadvertence had not filed their claims, and the directors were desirous of allowing them to do so.

The Chief Justice: Among the compromises I see one by Sir Thomas Scanlen. How does that stand with regard to the Union Bank claim in his estate?

Mr. Schreiner: I believe it agrees with that, my lord; but I have not got the whole of the papers before me.

The Chief Justice: What is the arrangement? Does he assign the whole of his estate?

Mr. Schreiner: I have heard so privately, but I am not directly instructed to that effect.

The Chief Justice: But is the Union Bank a party to the present arrangement?

Mr. Schreiner: I have no information, my lord; but there have been no objections.

Mr. Justice Buchanan: You see, you ask for confirmation so far as one bank is concerned, but the other bank may object.

Mr. Schreiner saw the force of the objection, but said that the previous matter in which Sir T. Scanlen was concerned was of a different character.

The Chief Justice said it was a pity that the Union Bank had not been approached seeing that it was a creditor for £37,000. Subsequently,

The Court confirmed the compromises with the exception of that relating to the estate of Sir T. Scanlen, which was ordered to stand over until such time as the liquidators of the Union Bank could apply to the Court for sanction to the proposed arrangement. The time for the filing of claims was extended till June 30, 1892.

Following is a list of the compromises:

Adler, Henry, Johannesburg, £1,500, offers £100 cash, already paid.

Bonas, G. H., Kimberley, £2,772 1s. 1d., offers £256 cash, already paid, and the following shares, 500 Ida Gold-mining Company (Limited), 500 Britannia Gold-mining Company (Limited).

De Villiers, A. B., P.F.son, Paarl, £780, offers 5s. 8d. in the £.

Freundlich, N. & J., Johannesburg, £552 offer 5s. in the £, £153 9s. already paid, provided the promissory note of Harris & Glaeser be surrendered, these being considered by the liquidators to be worthless.

Gradwell, M. W., Johannesburg, £856 7s. 5d. and interest, offers twelve promissory notes signed by D. C. Gradwell, of Graham's Town, for £5 15s. 9d. each, first of which is paid, being 8s. in the £ on his half-share of his liabilities to the bank,

Greenwall & Co., Solomon, Kimberley, £11,146 0s. 9d., offer £200, paid, all scrip in possession of bank, and sixteen promissory notes of £50, signed by H. Greenwall as surety and co-principal debtor; the promissory notes payable on the 1st of every month, commencing 1st November, on the understanding that, failing payment of any of the instalments as they become due, the sums paid shall be placed to credit of obligations, and the whole debt revive.

Hermann, Hans, Port Elizabeth, £875, offers £50 cash, already paid, and all the securities in the bank's possession.

Neumann & Co., H., Johannesburg, £1,523 11s. 5d., offer £150 cash, already paid, and all the securities in the bank's possession.

Scanlen, Thomas Charles, Cape Town, £7,530, assigns the whole of his estate to G. W. Steytler and Harry Gibson, official liquidators of Union Bank, and to D. Mudie and H. J. Feltham, two of the official liquidators Cape Good Hope Bank.

Stretton, G. A., Johannesburg, £845 11s. 5d., offers 8s. in the £, £68 9s. already paid of his half-share of his debt.

Wolfe, F. R., G., and M. H. S., London, £1,170, offer £250 cash, already paid.

Maypu, Chas. K., Klerksdorp, £297 7s. 6d., offers £25 cash, already paid, and all the securities in the bank's possession.

IN THE INSOLVENT ESTATE OF D. G. DEVENISH AND THE ESTATE OF JAMES LAMB.

Mr. Schreiner moved for orders varying the confirmation of the second distribution account in the said estate, by reducing the amount available for creditors to the amount received as dividends from the Cape of Good Hope Bank on the deposit to the credit of the estate.

The orders were granted.

IN THE ESTATE OF THE LATE WILLIAM PRETORIUS.

Mr. Schreiner moved for authority to the executor to sell a certain farm known as Retreat, in the district of Maclear, and to pay the shares of the minor heirs into the Guardians' Fund, in terms of the Master's report.

The order was granted in terms of the Master's report.

IN THE INSOLVENT ESTATE OF SEBASTIAN VAN RENEN.

Mr. Searle moved to make absolute a rule *nisi* for the removal from office of George Hill Dunsmure, one of the trustees of the said estate, by reason of his absence from the Colony.

The order was granted.

IN THE ESTATE OF GERT C. OLIVIER AND DECEASED WIFE.

Mr. Searle moved for authority to sell so much of the landed property belonging to the estate in the district of Oudtshoorn as will suffice to pay off the mortgage debts due thereon.

The order was granted.

THE PETITION OF CHRISTINA WOODCOCK.

Mr. Searle moved for leave to sue by edictal citation in an action about to be instituted against petitioner's husband for restitution of conjugal rights.

The order was granted, and made returnable on the last day of term.

SUPREME COURT.

MONDAY, NOVEMBER 30.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

DE FREITAS V. DE FREITAS.

Mr. Shiel appeared for the plaintiff; and Mr. Molteno for the defendant.

This was an action for divorce, instituted by Joseph de Freitas, a hairdresser, carrying on business at Simon's Town, against his wife, by reason of her adultery with one Antonie de Freitas, her brother-in-law.

The declaration alleged that the parties were married in Cape Town in 1881, and that there were four children of the marriage. It was further alleged that the defendant committed adultery in February, 1890, at Wynberg, and at Simon's Town in August, 1891, with Antonie de Freitas. The declaration asked for the dissolution of the marriage, that the plaintiff should have the custody of the children, and that the defendant should be deprived of all benefit by virtue of her marriage in community of property.

The plea admitted the marriage, but denied the adultery.

Joseph de Freitas deposed that he lived with his wife happily until his brother, Antoine de Freitas, arrived in June, 1888, from Madeira. After his arrival misunderstandings arose. In November, 1888, he and his wife went to Madeira, and returned in April of the following year. In February, 1890, his wife complained of wanting

change of air, and she went to Wynberg, where his brother was managing a business for a friend. On the 26th August last he arrived home late from Cape Town, and breaking in the door, went upstairs and found his wife and brother coming out of the bedroom partially dressed. He was very angry, and threatened to kill his brother, when his wife said "Kick us out, but don't do anything else." He asked his wife for an explanation, and she said that his brother went into the room to play with the children and fell asleep. He had subsequent communication with her, when she confessed to intimacy with her brother-in-law, and also with a Portuguese captain. He offered to forgive her if she turned over a new leaf, but she refused. After a further confession he even then promised to forgive her, but when she went further, and said she was *enciente* by her brother, he said that was an offence he could not forgive. He brought no pressure to bear on his wife to induce her to confess.

Cross-examined: He never struck or kicked his wife, or made her a prisoner in the house.

Henrick da Silva deposed to witnessing various familiarities between the defendant and Antonie in November, 1889.

Cross-examined: He did not like to tell the plaintiff, because he had been very good to him, and he did not wish to break up his home. Besides that he was afraid that plaintiff would not believe him.

Rev. T. Meagher deposed that on the 8th September last the plaintiff had an interview with him, and in consequence of that interview he visited his home. He saw the defendant and suggested a reconciliation, but she refused to listen to him. She admitted being unfaithful to her husband many times. She made this statemtnt in a calm, deliberate manner, and did not appear to be under any coercion.

Mr. Shiel said he had evidence of the adultery at Wynberg, but as the witness was one of the plaintiff's children he had some hesitation in calling him to give evidence against his mother.

The Chief Justice said he would take the evidence for the defence first.

Emily de Freitas deposed that Antonie had lived with them about four years. In February, 1890, she went to live at Wynberg, but did nothing wrong with Antonie there. In August last plaintiff went to Cape Town, to put one of the children to school. He did not arrive till late in the night; she was waiting for him in company with one of her children. Antonie was in the bedroom in the course of the evening, in company with her nephew. Between one and two a.m. she heard somebody breaking into the house, and called out to Antonie for assistance. He got up, and just then plaintiff came upstairs, and threatened to kill his brother with a knobkerrie. Plaintiff accused her of infidelity, saying that he had been so informed by one Jacques March. He was always illtreating her, and had a most treacherous temper. She had been beaten black and blue, and kept a prisoner in the house. In the night of the 7th September he beat her until from very fear she confessed that she had done wrong. She told Father Meagher what he forced her to say. There was not a word of truth in De Silva's evidence. He could not possibly see into the room in which he alleged the familiarity took place. When Da Silva was living in the house she did call him into one of the rooms to assist Antoine, who had been seized with a fit; it was a little room behind the shop.

Cross-examined by Mr. Shiel: The back door was usually nailed up. The cigarettes found in her bedroom were left there by Antonie, who in the early part of the evening was playing with the children. She did not tell Father Meagher that she had been forced to make a confession. If her son swore he saw Antonie sleeping with her at Wynberg it would be false.

Antonie de Freitas denied the allegations of the plaintiff and his witnesses. On the night of the 26th August, hearing a scream apparently coming from the bedroom, he was about to see what was the matter when the plaintiff appeared armed with a big stick and threatened to kill him.

Cross-examined: Nothing wrong occurred at Wynberg, whatever might be said by Louis de Freitas or plaintiff's son Joseph.

By the Court: He did not nail the back door up.

Rev. T. Meagher, recalled, said that the plaintiff seemed to be very fond of his wife, but he might have been jealous of his brother, having had his suspicions aroused by some person.

Mr. Molteno having addressed the Court,

The Chief Justice said he would like to hear the evidence of the child in respect to the alleged adultery at Wynberg.

Joseph de Freitas, plaintiff's son, aged nine years, deposed that he remembered going to Wynberg with his mother some months ago. They lived in Church-street. He saw his uncle Antonie with his mother in the same bed. They told him they would put cayenne pepper in his mouth if he said anything to his father about what he saw.

The Chief Justice, without calling upon Mr. Shiel, said the Court was of opinion that the charge of adultery had been established, and would therefore declare a dissolution of the marriage; order that plaintiff have the care and custody of the children; and that defendant forfeit all benefit under the marriage in community of property. There would be no order as to costs.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. van Zyl & Buissinne.]

RICHARDS V. RICHARDS.

Mr. Tredgold for plaintiff; defendant in default. This was an action for restitution of conjugal rights, brought by the wife against her husband.

Margaretha Aletta Richards deposed that she was married on the 27th September, 1859, at Bredasdorp. After the marriage her husband and she went to Kaik Bay, Victoria West, Ladismith, and Humansdorp. At the last-named place he deserted her, and since 1869 she had never seen him or heard of him, but was subsequently told that he had left for Canada. She was not aware whether he had any property in the Colony. There were two children of the marriage, both majors.

The Court granted an order, returnable on the 15th February next, calling upon defendant to return to his wife, failing which, an order to be issued calling upon him to show cause why a decree of divorce should not be granted, and the property in the estate equally divided; personal service, if possible (failing which one publication in the *Government Gazette* and *Toronto Globe*).

VAN RHYN V. VAN ZYL.

Mr. Schreiner for appellant (defendant in the Court below); Mr. Juta for respondent (plaintiff in the Court below). This was an appeal from a decision of the Resident Magistrate of Clanwilliam. Van Zyl summoned Van Rhyn to recover £4 10s., or the price of two cows, valued at £5, less 10s. due in settlement of an account. The defendant counter-claimed for £18 15s. balance of account alleged to be due. Judgment was given for plaintiff with costs, and the claim in reconvention disallowed. Against the judgment for costs the appeal was made, on the ground that the amount claimed had been tendered and refused.

After argument,

The Chief Justice said it appeared to him that this appeal was entirely on a question of costs The Magistrate seemed to have exercised a wise discretion, and the Court would be very loth to interfere in the matter of costs. The appeal must be dismissed with costs.

[Appellant's Attorneys, Wessels & Standen; Respondent's Attorney, Messrs. van Zyl & Bussinae.]

WESSELS' EXECUTORS AND BISSET V. THE MASTER OF THE HIGH COURT.

Bond—Sureties—Liability—Ordinance 104, sections 21, 27, 33—Will—Omission to appoint executors—Executors dative—Breach of trust—Master of High Court—Negligence—"Burden of proof"—Interest—Costs—Appeal.

Per de Villiers, C.J.—*In the ordinary case in which a principal debtor acknowledges himself to be indebted in a certain sum for money advanced, or to be advanced, and renounces the exception* non numeratæ pecuniæ *this Court would hold, as it did hold in* "De Waal v. Van Zyl" (3 Juta, 188), *that the creditor is entitled to provisional sentence against the sureties under the bond. No proof* aliunde *would be required that the amount is due in the absence of* prima-facie *evidence that it is not due wholly or in part. In every case, however, the document sued upon must speak for itself.*

Sir T. Upington, Q.C., and Mr. Schreiner appeared for the appellants (defendants in the Court below), and the Acting Attorney-General (Mr. Searle) and Mr. Giddy for the respondent.

This was an appeal from a judgment of the High Court of Griqualand West in a case instituted in June last by Henry Francis Ford (in his capacity as Master of the High Court of Griqualand) against Magdalena Susannah Wessels (widow of the late Adrian Gerhardus Alexander Wessels) and John Thomas (in their capacity as the executors testamentary of the late A. G. A. Wessels) and John Bisset. The facts appear from the declaration, the substance of which is as follows;

On or about the 16th October, 1879, one Fergus Conn, in his lifetime a shopkeeper and farmer residing on the farm Roodelaagte in Griqualand West, died leaving a will in which he made no appointment of executors to his estate.

On or about the 4th February, 1880, at a meeting of the next of kin and creditors held pursuant to an edict duly published in the *Government Gazette* of the 19th December, 1879, Caroline Magdalena Conn, the wife of the deceased, and Fergus Conn, an illegitimate son of the deceased, were duly appointed executors dative of the estate of the deceased Fergus Conn, and letters of administration were duly issued to them as such executors.

Thereupon the aforesaid executors dative entered into a bond of security as by law required binding themselves to the Master of the High Court of Griqualand in the sum of £10,000 sterling, to be paid on demand, for the due and faithful administration by them of the aforesaid estate of Fergus Conn.

In the said bond of security the defendant, John Bissett, and one Adrian Gerhardus Wessels, husband of the defendant, Magdalena Susannah Wessels, bound themselves as sureties *in solidum* and joint principal debtors to the said Master for

the payment of the aforesaid sum of £10,000 under the express renunciation of the benefits *ordinis divisionis et excussionis*.

The condition of the said bond was that if the aforesaid executors dative should duly and faithfully administer the aforesaid estates of the said Fergus Conn, and render a proper account of their administration, then the bond should be void and of no effect, otherwise it should be and remain in full force and effect.

The aforesaid executors dative did not duly and faithfully administer the aforesaid estate of the said Fergus Conn and did not render an account of their administration, but one of the said executors, to wit the said Fergus Conn, appropriated to his own use a large sum of money belonging to the said estate, and the said executors thus and otherwise misapplied nearly the whole of the estate, amounting in value to over £10,000, and on or about the 16th February, 1885, the said executors dative were removed from their office by an order of the High Court.

The said Adrian Gerhardus Wessels died on or about the 27th day of May, 1888, and the defendants Magdalena Susannah Wessels and John Thomas were the executors appointed by him in his last will and testament.

Letters of administration have been duly granted to the defendants Magdalena Susannah Wessels and John Thomas as executors of the estate of the said Adrian Gerhardus Wessels.

The plaintiff submits that the aforesaid bond is in full force and effect, and that the defendant John Bissett and the other defendants in their capacity as executors of the estate of Adrian Gerhardus Wessels are laible to the sum of £10,000 jointly and severally.

Whereupon the plaintiff claims: (1) The sum of £10,000 from the defendant John Bissett and the other defendants, the executors of the estate of Adrian Gerhardus Wessels jointly and severally, the one paying, the other to be discharged; (2) interest thereon *a tempore moræ*; (3) general and further relief; (4) costs of suit.

The defendants in their pleas denied that the edict was duly and lawfully published, or that the appointments were made, and the letters of administration issued in accordance with the law—inasmuch as the meeting held in pursuance of the edict purported to be a meeting of the next of kin and creditors, for the purpose of electing and appointing executors dative of the *intestate* estate of the deceased, Fergus Conn, whereas the said Fergus Conn had died *leaving a will and not intestate*. That afterwards on the 16th February, 1885, and in consequence of the aforesaid illegal and informal proceedings, the appointment of Carolina Magdelena Conn and Fergus Conn, jun., as executors dative, was by order of Court set aside and declared null and void—and that in consequence of the illegal and informal proceedings referred to above and subsequent order of Court, the bond sued upon was of no force and effect and that the defendants were neither jointly nor severally liable to the plaintiff in the sum of £10,000 as alleged, or in any other sum. It was further specially pleaded, in case the bond should be held of full force and effect, that on the 17th December, 1885, a true and final account of the administration of the estate of Fergus Conn was filed and lodged with the Master of the High Court, and accepted by him as correct; and that according to that account there was due to the heirs of Fergus Conn from the estate £4,222 18s. 1d., which sum it was agreed between the Master and Carolina Magdalena Conn, widow of Fergus Conn, should be paid by her to the heirs of the estate, and that the Master thereby released the sureties from their obligation under the bond. Wherefore the defendants prayed that the plaintiff's claim might be dismissed with costs.

The Court gave judgment for the plaintiff in the sum of £5,581 with costs, and from this judgment the defendants now appealed.

Sir T. Upington contended that his clients should not be held liable for the amount of the security bond, as the appointment of the executors was illegal, and that the judgment of £5,000 recorded by the Court below should be reversed with costs.

SUPREME COURT.

TUESDAY, DECEMBER 1.

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

WESSELS EXECUTORS AND BISSET V. THE MASTER, HIGH COURT.

The Acting Attorney-General (Mr. Searle) was heard for the respondent.

The Chief Justice: No more grossly mismanged estate has ever come before this Court, or indeed before any Court. From the Master of the High Court of Kimberley, who at the time had control over its affairs, down to the executors and everyone connected with the estate, there has been the grossest mismanagement possible. It would be somewhat difficulty for this reason to frame accounts.

Mr. Justice Buchanan: The case affords a very

strong argument in favour of placing the whole of the Master's Office work under one responsible head.

Sir T. Upington: It shows a scandalous condition of things.

Mr. Justice Smith said he had already stated that the only clear point was that the sureties had been grievously injured.

Cur ad vult.

Postea (Dec. 3rd).

The Court delivered judgment:

The Chief Justice said: The late Fergus Conn, sen., of Griqualand West, by his will bequeathed all his property in equal shares to his illegitimate son Fergus and to his wife and eight legitimate children, but omitted to appoint any executors of his will. After his death, in 1879, the then Master of the High Court called a meeting of next of kin and creditors for the election of one or more executors, but gave short notice of the day of meeting. This was the first of a lamentable series of blunders committed by himself and others concerned in the management of the estate. The mistake was rectified, but in the next edict issued by the Master the deceased was stated to have died intestate, whereas the intestacy applied only to the appointment of executors. The edict was addressed to the next of kin and creditors of the deceased, whereas under the 21st section of Ordinance No. 104 it should have been addressed to the surviving spouse and legatees as well as to the next of kin and creditors. At the meeting, however, the surviving spouse and legatees were represented and took part in the election of executors and in all the other proceedings, and the existence of the will was recognised by all present. The widow and the illegitimate son of the deceased were elected and appointed as executors, and on the 4th of February the defendants passed a bond in favour of the New Master as sureties, in terms of the 27th section of the Ordinance, for the due and faithful administration of the estate by the executors dative. The administration of the estate seems to have been left by the widow in the hands of her co-executor. For more than three years he was allowed to mismanage the estate and misappropriate the assets without, as far as it appears, any intervention of the Master, whose duty it was to call the executors to account. One of the sureties protested against this delay on the 3rd of March, 1883, but it was not until 21st of July that the Master awoke to his duty and summoned the executors to file their account. Fergus Conn, jun., thereupon absconded and an account was framed, but not it seems filed, by the executrix, Mrs. Conn. On the 16th of February, 1885, the High Court, upon the application of Mrs. Conn, removed her and her co-executor from their trust on the ground, as stated by the Judge President in his reasons, of their misconduct. Thereafter Mr. J. S Stuart was elected and appointed as executor dative, and he has framed and filed two accounts, the first of which relates to the administration of the deposed executors, and the second to his own administration. From these accounts it appears that there are no assets left to pay to the eight legitimate children the shares which they would have been entitled to receive if the estate had been properly administered and a debt of £150 due to one Van Dyk. The present Master sued the defendants in the High Court for the amount of the bond, namely, £10,000, and that Court gave judgment for the sum of £5,581 with costs. That judgment has now been appealed against. There is no plea on the record that the former Master's negligence debars the present Master from recovery on the bond, nor has this defence been raised on appeal. I therefore make no remark on this point except this, that no greater liability ought to be thrown upon the sureties at the instance of the Master than that which strict law requires. The defence mainly relied upon is that the executors were not legally appointed, and that therefore the bond given by the defendants was null and void. In my opinion this defence must fail altogether. There was no illegality in the appointment of the executors, seeing that every one who had a right to be present at the meeting for the election of executors was in fact present, and took part in the election without objection. I agree with the Judge President that although the irregularity in the form of the edict might have been made a ground of objection at the time of the meeting, it cannot, in the absence of such objection, or of prejudice to any one, be held sufficient to nullify all subsequent proceedings. The fact that the appointment of the executors was afterwards set aside on the ground of misconduct cannot relieve the sureties from their liability for maladministration committed before the cancelling of the appointment. The important question next arises, assuming that the bond is still in force, for what amount, if any, ought judgment to have been given against the defendants? There has been much discussion in this Court, and in the Court below, as to whether the burden of proof lay upon the plaintiff or upon the defendants; but this question does not appear to me to be of much practical importance in this case. In the ordinary case in which a principal debtor acknowledges himself to be indebted in a certain sum for money advanced, or to be advanced, and renounces the exception *non numeratae pecuniae* this Court would hold, as it did hold in "De Waal v. Van Zyl" (3 Juta, 188), that the creditor is entitled to provisional sentence against the sureties under the bond. No proof *aliunde* would be required that the amount is due in the absence of

prima-facie evidence that it is not due wholly or in part. In every case, however, the document sued upon must speak for itself. Now a bond given under the 27th section of the Ordinance is avowedly given as security for due and faithful administration by executors. An amount is fixed to define the extreme limit of the sureties' liabilities, but without evidence *aliunde* it is impossible to ascertain the precise amount of that liability. By whom should that evidence in the first instance be furnished? On principle, I should say by the Master who seeks to enforce the liability, and in this view Mr. Justice Solomon seems to concur. He considered himself bound, however, by two decisions of the High Court to the contrary but as these decisions are not binding upon this Court it is open to us to reconsider them with the due respect which we owe to the members of that Court. Let me go to the root of this matter. The sole interest which the Master has in the administration of estates is to protect the interests of creditors, heirs, legatees, and all other persons having any claim upon the estate. If he recovers more than is sufficient to satisfy all claimants he could hardly place the surplus in the coffers of the Government, much less keep it for himself. He has full power—indeed it is his duty—to compel the executors dative to file their accounts with him after the expiration of twelve months from the granting of letters of administration. It is no hardship, therefore, upon the Master that, if he sues upon a bond of security, he should be called upon in the first instance to furnish *prima-facie* evidence that the amount claimed by him is required for the due administration of the estate. When he sues the executors themselves, their refusal to furnish him with the requisite information would tell against them in deciding whether sufficient evidence has been furnished by the Master. Where he sues the sureties his neglect to call the executors to account must tell against him. In either case, if no evidence at all were produced on either side, the judgment would have to be given against the Master, and "the burden of proof" therefore, as the terms are explained by Stephen (Digest of Law of Evidence, Article 95), lies upon the Master. Whether he has given sufficient *prima-facie* evidence to shift the burden of proof on to the defendant must depend on the circumstances of each case. Coming next to the details of the account charge against the defendants, I am of opinion that the Court below ought not to have charged them with the amount of the legacies due to the two executors. The executors themselves, if sued, would have been entitled to the benefit of the deduction, and the sureties cannot be placed in a worse position than the principal debtors. The amount which the plaintiff is concerned in claiming is such sum as will be sufficient to satisfy all claims against the estate. Those claims consist, according to Stewart's account, of a debt of £150 owing to Van Dyk and the sums due to the eight legitimate children of the testator. Those children should be placed in the same position as they would have been in if the estate had been duly and faithfully administered. They ought not to be placed in a worse position, and they cannot claim, nor can the Master on their behalf claim, to be placed in a better position as against the defendants. The Master has received his full fees on the executors' remuneration of £396 10s., and yet his successor has refused to allow the sureties the benefit of that amount. It is true that under the 33rd section of the Ordinance an executor who fails, without sufficient excuse, to lodge his account in proper time, forfeits all claim to executors' fees; but it is a fairly debatable question whether there should not first be an order of Court declaring such forfeiture. But apart from this question, I am of opinion that the fact that the Master has charged and received fees on the executors' remuneration, coupled with the fact that the inheritances would in the ordinary course of administration have been subject to the deduction of such remuneration entitles the sureties to the benefit of the remuneration when called upon to place the residuary legatees in the position in which they would have been if there had been a due and faithful administration of the estate. As to the item of maintenance for children, the Court held that the most which could have been disbursed by the executors on account of the widow and children was £1,020, leaving a deficiency of £840. The children, will, of course, be entitled to the benefit of this latter amount, but on the other hand they must be debited with the money paid for their share of the maintenance. As to the item relating to Van Dyk, the decision of the Court must have proceeded upon the assumption that £1,034 had been due to him, and £884 paid to him, leaving a balance of £150 still due to him. The Court, therefore, properly credited the estate with the sum of £150, thus overcharged, and to the benefit of this credit the children are entitled. On behalf of the defendants credit has been claimed for some items appearing in the first account framed by Mrs. Conn, including a sum of £549 alleged to have been paid to one A. G. Wessels for promissory notes and interest. Some vouchers might fairly have been expected in respect of these items, and in the absence of such vouchers I do not think the items ought to be allowed. In regard, however, to the sum of £575 paid to Stuart by Haarhoff on behalf of the estate, it ought to be debited against the children so far as it has been beneficially expended. Besides the sum of £24 9s. 7d., which has been allowed by the

Court as having been paid to the Master himself, there are items beneficially expended, amounting to £106 15s. 6d. One of the unpleasant features of this mismanaged estate is the enormous sum absorbed by bills of costs, but unfortunately those payments cannot be reopened in this appeal. There is no explanation why the first summons issued against the defendants in 1884 was withdrawn and a fresh one issued in the present year. The later summons prays for interest *a tempore morae*, but the Court below by its judgment awarded no interest at all. The plaintiff, however, is clearly entitled to interest, and the only question is whether interest is to run from the date of the first or from the date of the second summons. As the plaintiff's counsel has not asked for interest from the date of the first summons, and as the practice is to award interest only from the date of the summons, in respect of which judgment is given, the interest on the amount found due to the plaintiff by this Court will begin from the later date, namely, the 28th of April, 1891. As to the costs, the defendants will be entitled to their costs of appeal, but as the Master has really instituted the action on behalf of the persons interested in the estate, it is only fair that the estate should bear them. The result is that upon the accounts as rectified upon the basis of our judgment there is a balance due to the plaintiff of £3,308 18s. instead of £5,581 as found by the Court below, and the judgment will therefore be amended accordingly, with interest from the 28th of April, 1891, and with costs in the Court below. The costs of appeal to come out of the estate. It is clearly understood that should the Master find that the sum of £150 is not due to Van Dyk that sum will be refunded to the defendants.

Mr. Justice Smith concurred, and said there appeared no doubt whatever with regard to interest. The only interest that could be claimed was from the date of the summons in respect of which judgment was given.

Mr. Searle said that in saying what he had said about the Master's Office at Kimberley, he presumed the Chief Justice did not refer to the present Master.

The Chief Justice: Oh, not at all.

Mr. Justice Buchanan also concurred, and said that he had worked out the figures in quite a different way to the Chief Justice, but his figures came to nearly the same result.

Mr. Searle asked if the judgment referred to all costs.

The Chief Justice replied that it did.

[Appellants' Attorneys, Messrs. van Zyl & Buissinne; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

STURROCK V. BIRT.

Libel — Damages — Action —Settlement by consent.

Sir T. Upington, Q.C., and Mr. Juta appeared for the plaintiff, and Mr. Schreiner and Mr. Jones for the defendant.

This was an action for libel instituted by Miss Elizabeth W. H. Sturrock against Rev. Richard Birt. Damages were laid at £5,000.

The fact of the case will be gathered from the pleadings, summaries of which follow:

The plaintiff's declaration stated: The plaintiff was at the time of the grievance complained of and now is agent of a society known as "The Society for Promoting Female Education in the East," and then was and now is in charge of a school at Peelton, in the Colony, supported by the said society. The defendant is Congregational minister at Peelton, and an agent of the London Missionary Society. On or about the month of May, 1889, the defendant falsely and maliciously wrote and published in a letter addressed to Miss Ellen Rutt of and concerning the plaintiff, and of and concerning her in her capacities in connection with the said society, the false and defamatory words following, namely: "Miss Sturrock has the love of power amounting to a craze, which has led her into many faults, and I fear untruths. . . . The people protest against Miss S. being continued here, when her character as a Christian teacher is lost. I shall also protest loudly against a teacher who has developed such an unfitness for further work, and who is not able to work with us, but is against us. One of the greatest difficulties in our work is the sin of drunkenness, and when her habit of using intoxicants to excess is so well known to all the young people, as well as to the old, it is time that Miss Sturrock be recalled from work here. 'The very boys know it,' said a godly woman who was one of Miss Sturrock's bible women, to me. A youth of seventeen, who was still at school, a good Christian lad, evidently knew of Miss S.'s propensity. I asked him how he got to know that, and his reply was 'from the girls of our kraal, including my sisters; they talk about it.' The girls, too, on leaving school, passing the shop have been heard both by natives and Europeans, to say that "Tangana" (Miss S.'s Kafir's name) has been drinking again to-day, and that is why she beats us so.' Can it be possible that a teacher whose young pupils see her moral unfitness should be upheld in all her representations, and whose new scheme for occupying the school buildings is entertained!! In or about the month of May, 1889, the defendant falsely and mali-

ciously wrote and published in a letter to the said Miss Rutt, of and concerning the plaintiff, the false and defamatory words following: 'What she now uses is bromide of potash, she said. These drugs alone, or with intoxicants, have blunted her moral sense, hence the complaint of untruthfulness, hence her violent and unchristian temper. At any rate, caused by what it may, she is not the Miss Sturrock she used to be at the first, nor fit to hold her position. . . . . We can't have a teacher forced upon us who has not a clean bill of moral health, nor is it right that we be deprived of our girls' day school, the money for which was given by the Government for Peelton, and not for outsiders.'" By reason of the libels complained of the plaintiff has suffered damage in her credit, reputation, occupation, and otherwise. The plaintiff claims: (*a*) £5,000 as damages for the grievances complained of, and (*b*) such further or other relief as may seem meet, with her costs of suit.

The defendant filed the following plea:

The defendant admits the allegations contained in paragraph 1 of the declaration, save and except that the plaintiff has any just or lawful grievance as therein alleged. The defendant admits that he wrote and published of and concerning the plaintiff to Miss Ellen Rutt, the hon. secretary of the 'Society for Promoting Female Education in the East,' the words set forth in paragraphs 2 and 3 of the declaration, or words similar thereto, but he denies that he so wrote and published the said words falsely and maliciously, or that the said words are false and defamatory as alleged in the said paragraphs. He says specially that the words alluded to formed part of certain letters addressed by him to the said Miss Rutt, and he refers the Court to the whole of such letters when produced. He denies the allegations contained in paragraph 4 of the declaration. He says specially that the words complained of were written by him, as as minister of religion at Peelton, in the course of a correspondence with the said Miss Rutt, relative to charges and complaints made against the plaintiff as the schoolmistress and teacher in charge of a school for youth at Peelton, and the said words are true in substance and in fact, and were written to the said Miss Rutt *bona fide* and without any malice towards the plaintiff, but upon privileged occasions, in the public interest, in the interest of those in whose moral welfare he was and is concerned, and in the discharge of a duty resting upon the defendant to speak the truth to the said Miss Rutt, in respect of the character of the plaintiff, and her unfitness for the said office of schoolmistress and teacher held by her. Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Upon these pleadings issue was joined.

Sir T. Upington said it was with very great pleasure indeed that he had to inform the Court that that very painful case had been brought to a satisfactory conclusion between the parties. There was a consent paper drawn up, which he would hand in, but would first read in full, as the parties wished that the Court should hear it. The paper was as follows: "It is hereby agreed that this action be not further proceeded with, the defendant agreeing to withdraw his plea of justification, and the charges alleged against the plaintiff. It is hereby agreed that the plaintiff and defendant each pay their own costs, and it is further agreed that this paper be placed among the records of the action, if the Supreme Court will allow it." He was very glad that the case had arrived at that conclusion, for both the plaintiff and the defendant were people who had done most excellent work—missionary work—in this country, and he sincerely hoped that that would be an end of any quarrel between them, and that nothing further would be heard in the future with regard to any little differences that might exist between them.

The Chief Justice said that, in his opinion, the settlement was creditable to both parties.

Mr. Schreiner said he would like to make a few observations upon the case. Their lordships were aware of the nature of the case, which was, as his learned friend had said, a very painful one. His client, Mr. Birt, was now about eighty years of age, and for many, many years had laboured at Peelton as a leading missionary. He felt sure he was not saying anything his learned friend would contradict when he said that Mr. Birt wrote, at the time, under a sense of duty to the congregation which for so many years he had faithfully served. He possessed information, collected from various sources, and he (Mr. Schreiner) did not think he was speaking against the spirit of the settlement when he said that the action of Mr. Birt had been *bona fide* and without malice towards Miss Sturrock, with whom he was long on terms of friendship in the past. Mr. Birt's position had made it a matter of some delicacy for his advisers to agree to the settlement which had been arrived at, inasmuch as he was paralysed and in such a weak state of health that his memory was almost gone, and he was unable to finish his examination before the Commission. He felt that the settlement of the action was one such as the best friends of both parties would wish.

Sir T. Upington said that if it was desired by his learned friend he would at once say that he had never intended in the case to charge personal animosity against a venerable missionary like Mr Birt. He hoped sincerely that they had now heard the last of the matter for ever, and that some

attempt would be made to have peace upon this station.

The Court gave judgment in the terms of the consent paper.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Findlay & Tait.]

DU PLESSIS' EXECUTORS V. DU PLESSIS' EXECUTORS.

Mr. Searle for the executors of the late J. M. du Plessis (born Vogelgezang), widow of the late P. J. du Plessis; Mr. Schreiner for the executors of E. M. du Plessis, the testatrix.

This case was adjourned *sine die* for the joinder of P. J. du Plessis' and J. M. du Plessis' representatives.

MCKAY V. DE BEERS MINING CO.

Contract—Collateral agreement—Novation—Appeal—Costs.

Where on appeal the judgment of the Court below was upheld but on different grounds to those upon which the judgment of the Lower Court was founded.

Held (Smith, J., *dissenting*), that the appeal should be dismissed *with costs*.

The Acting Attorney-General (Mr. Searle) and Mr. Molteno for appellant; Sir T. Upington, Q.C., and Mr. Schreiner for the respondent company.

This was an appeal from a judgment of the High Court of Griqualand West, in an action in which the present appellant was the plaintiff, and the De Beer's Mining Company the defendants.

The facts appear sufficiently from the judgment of the learned Judge President of the High Court, which was as follows:

In this action the plaintiff sues the defendants, as Trustees of the De Beer's Mining Co., Limited, for the sum of £180, as due to him under a contract made between the parties in February, 1888, and annexed to the declaration.

By this contract the defendant company purchased from the plaintiff a half share in certain farms and other property situated in the S. A. Republic, upon the condition *inter alia* that the purchasers should "pay the wages due to the caretakers on the said farms from February 1st, 1888."

The plaintiff in his declaration also alleged that it was subsequently arranged between the parties that the defendants should pay these wages to him, and he should pay them over to the caretakers.

In the course of the case, however, his counsel intimated that he did not rely on the allegations contained in paragraphs 6 and 7 of the declaration, and that he based his claim exclusively on the terms of the original contract.

The sum of £180 is claimed on account of wages paid to a caretaker on the farm, either, I presume, as money paid by the plaintiff at the defendants' implied instance and request, or as damages sustained by him by reason of their breach of contract to pay the caretaker themselves. The defendants plead *inter alia* that on March 31, 1888, all the assets and liabilities of the De Beer's Mining Company, Limited, including the property acquired under this contract, were transferred to the De Beer's Consolidated Mines Limited, and that the obligations created by this Contract were transferred to the latter Company, with the knowledge and consent of the plaintiff, who accepted the De Beer's Consolidated Mines as a party to the contract in lieu of the defendant company. At the close of the plaintiff's case, the defendants applied for absolution from the instance on the grounds: : (1). that this plea had been established by the plaintiff's evidence; (2). that in any case the plaintiff had failed to established his claim. After hearing argument on the first of these two grounds, the Court reserved its judgment on that branch of the case. I am usually reluctant to grant absolution at this stage of a case, lest, in the event of the judgment of this Court being held erroneous on appeal, the result of such non-suit should be to involve the parties in the delay and expense of what practically amounts to a new trial; but when we are pressed for a decision on such an application, we are bound to give it to the best of our judgment on the facts before us. The real question is, whether the novation of contract pleaded by the defendants has been proved to have taken place. Now, as Pollock says, in the passage cited by Counsel, "Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request": Pollock on contracts, 4th ed. 193; *Conquest's case*, 1 Ch. D. 334. Voet's statement of the law is much to the same effect. He dissents from Groenewegen's view that, under the modern civil law, following Justinian's constitution on the subject, a novation must be in express terms: *Magis tamen est*, he says, *ut cum aliis existimemus, etiam ex conjecturis præsumtionem novationis induci nunc posse, si illæ adeo verisimiles ac urgentes sint, ut ex iis perspicuum esse possit, a prima obligatione partes recedere et illam in secundam transferre voluisse; ut ita tacitæ sed satis perspicuæ, idem, qui expressæ, voluntatis effectus sit: quod forte nec ipsi juri civili novissimo adversatur: dum Justinianus constituit, voluntate solum, non lege novandum,*

adeoque solas reprobat conjecturas lege magis quam probabili partium voluntate subnixas: XLVI ii: 3. The English cases quoted are to the same effect, namely, that a novation may be presumed from conduct, but that the evidence required to support such presumption must be of a cogent character. Thus in one of the two cases *in re National Provincial Life Assurance Society*, (L. R. 9 Eq. 306,) it was held on the facts that the party's conduct did disclose, and in the other, that it failed to disclose, a complete novation of contract. In the very strong case *In re Family Endowment Society*, relied on by the plaintiff, it was held that "strict proof will be required before it is held that a creditor of a Company, under a special contract, has accepted the liability of another Company with which the first is amalgamated" (L.R. 5 C.A. 118); and in *In re Manchester and London Life, &c., Association*, L. R. 9 Eq. 648, it was held that, in the absence of any evidence of notice of the transfer of the business and assets of one company to another, or assent thereto by the creditor, the former company was still liable to the creditor's claim. In each of these cases the question seems to have been whether the conduct of the creditor was consistent with his having regarded the new company merely as the agents of that with which he originally contracted, or whether he accepted the former as the delegates of the latter. In the present case, we have to decide a similar question on the facts as proved. Now it is not disputed that, very shortly after this contract was made, on March 31st, 1888, the De Beer's Mining Company transferred their liabilities and assets to a new company called the De Beer's Consolidated Mines. It was stated, I think, by the Crown Prosecutor in opening the plaintiff's case, that the contract now in question was ceded to the new company in the following October, and, however that may have been, it is admitted that the property transferred by plaintiff to the De Beer's Mining Company was subsequently re-transferred in the Transvaal Land Registry to the De Beer's Consolidated Mines. Of these transactions no formal notice was ever given to the plaintiff, but he admits that he was in fact aware that the new company had taken over the diamond mining property at De Beer's of the Defendants, and that this contract for the acquisition of certain coal-bearing farms, had been made on account of and in connection with that Diamond Mining property. Up to the month of November, 1888, the plaintiff continued to receive for the caretaker's wages, the cheques of the De Beer's Mining Company. A change then took place, and from that date he received the cheques of the new company for such payments, and gave receipts to them, both for the wages and for certain other expenses incurred by him in connection with the contract. It was stated by his counsel that the plaintiff in acknowledging communications from the new company was always careful to address his replies to the "De Beer's Mining Company," but as a matter of fact I find that his letter of May 14, 1889, was addressed to "W. Craven, Esq., Secretary of De Beer's C. M. Ld," the letters "C.M." clearing standing for "Consolidated Mines," and his next letter of May 16 is addressed in full to "W. Craven, Esq. Secretary De Beer's Consolidated Mines, Kimberley." Up to the time, however, it might perhaps be contended that the plaintiff regarded the new company merely as agents for the defendats, and it is suggested that he may have regarded the defendant company as still in existence, and still owning the half share of the coal farms purchased from him. The suggestion, however, that they might for all he knew have been retaining this coal for other purposes elsewhere is inconsistent, not only with the nature and objects of the company, but with some expressions contained in the plaintiff's letter to Mr. Craven of May 16, above referred to, in which he speaks of the increased Railway facilities for bringing coal from Waldrift to Kimberley where he admits that he was aware that the mining property of the defendants had been taken over by the new company. Moreover, whatever may have been the plaintiff's position up to this date, he tells us that about the middle of May he had an interview with Mr. Craven, at the office of his company, at which Mr. Craven asked him to hand him the original agreement in order to endorse thereon the cession which had been made to the Consolidated Mines. He refused, however, to do this, and on May 20 Mr. Craven wrote to him:—"I noticed when you produced your memorandum of agreement to me the other day, that the cession from the trustees of the De Beer's Mining Company to the trustees of this company had not been endorsed upon it; will you kindly bring the document up to have the endorsement made?" To this letter the plaintiff made no reply, but I find endorsed upon it these words, whatever they may mean: "P. S. —My agreement is with the De Beer's Mining Company, Ld. D. McKay. May 20, 1889." This endorsement was certainly not a postscript, and does not appear to have been communicated to the writer of the letter. (His Lordship here proceeded to refer to certain *dicta* of the Court of Appeal in the recent case of *Weidemann* vs. *Walpole*, reported in the *Times* of July 30th, as to the inference to be drawn from receipt of communications on matters of business to which no reply was sent) Now what took place at this interview, in May, 1889, and the terms of Mr. Craven's letter of May 20th are quite inconsistent with the plaintiff's statement that Mr. Craven's letter of October 2nd, 1890, was the first intimation he received that the rights acquired by this

contract had been ceded by the old to the new company. After May, 1889, it cannot be held that the plaintiff was entitled to regard the Consolidated Mines as merely the agents and not the cessionaires of the defendant company. Still it may be urged that mere knowledge, unaccompanied by consent, is not sufficient to create a novation; but the subsequent conduct of the plaintiff seems clearly to imply such consent. In the following August he proceeded to the farms and there personally handed over the machinery, plant, quarters for labourers, &c., to Mr. Austin, whom he admits he knew to be the agent of the new company; and Mr. Austin subsequently gave his son, the caretaker, notice that his services were no longer required, he went, acting under advice from Mr. Haarhoff, to Mr. Craven, as Secretary to the Company, to complain of this proceeding.

On the whole I can come to no other conclusion than that the plaintiff's conduct has been such as to preclude him from now denying the alleged novation, and that this plea has therefore been established.

I confess that what has most perplexed me in this case is to understand the plaintiff's reason for not suing the new company.

It is perfectly clear that after all that has taken place, they could not have denied their liability on the contract, he admits that he is quite satisfied as to their being in a position to meet any claim he may have against them; and he adds that, if the defendants had given him formal notice of the cession, this action would never have been brought. No doubt it would have been better if such notice had been given, but an action of this kind cannot be maintained merely on the ground of an apparent lack of courtesy, perhaps attributable to inadvertence.

With regard to the second ground on which the application for absolution was based, it has not been argued and it is unnecessary to discuss it; but perhaps I ought to add that the Court, in holding that the Consolidated Mines are now the proper parties to be sued on this contract, is not to be taken as laying down that the plaintiff has disclosed a good cause of action against that company.

Whether the effect of this contract was to bind the defendant company, or their successors in title, for all future time to pay such caretakers, as the plaintiff might choose to appoint such wages, as he might think, or as the Court might think, to be fair and reasonable, or whether on the other hand, the agreement merely gives the plaintiff a ground for suing for damages for breach of contract, should he sustain such damage by reason of the company not performing its undertaking, or whatever may be the precise legal effect of this stipulation, is a matter which the Court cannot determine until the proper parties are before it.

I would only venture to express a hope, in the plaintiff's interest, that, before running the risk of further litigation, he will be careful to assure himself that his position is a sound one.

The Court grants absolution from the instance with costs.

From this judgment the plaintiff now appealed.

The Acting Attorney-General, Mr. Searle, was heard in support of the appeal.

Sir T. Upington said that apart from the novation altogether the plaintiff could not succeed on the contract itself, and submitted that even if the decision of the Court below had been given for insufficient reasons—which was not the case for a moment—he submitted that the judgment should be maintained.

The Chief Justice gave judgment. His Lordship said it appeared to him that the pleader who drew the declaration felt that he could not succeed upon the *agreement* alone, and that he then inserted the 6th and 7th paragraphs of the declaration, which referred to a subsequent *collateral agreement*, by which an understanding was arrived at between the parties, as to the true meaning of the agreement, namely, that the company should pay to the plaintiff, from time to time, the wages already due and to become due to the caretakers, the plaintiff on his part undertaking to pay the money to the caretakers. But when the case was heard the 6th and 7th paragraphs were withdrawn, and the plaintiff relied only upon the rest of the declaration. In his opinion the withdrawal of those paragraphs carried with it the failure of the plaintiff's case altogether because upon the agreement he could not, in his opinion, succeed. The grammatical reading of the agreement would be that the De Beers Mining Company were to pay the wages from January 1 to February 15 only, but they might take it that future wages were also referred to. Still, the plaintiff could not succeed unless he could go so far as to convince the Court that he was to have the sole appointment of the caretakers and the company the sole privilege of paying for their services. The payment of the caretakers carried some weight as to their appointment. The plaintiff claimed the right of appointing all future caretakers at the defendant's expense. That, in his opinion, the plaintiff could not do. There was no proof that Austin was not on the farms as caretaker, and it did not appear that the company had refused to appoint its own caretakers. He considered that the plaintiff had failed to make out his case, and that absolution from the instance had been rightly given. As to the question of a novation, he confessed he should find great difficulty in agreeing with the Court below. He was not satisfied that the plaintiff could have sued the De Beers Consolidated Mines Company, or that that company would not have

had a good defence if he had done so. As to costs, he was of opinion that the judgment was right, and that although the Court below gave different reasons for its decision than those which he was inclined to give, that should not affect the question of costs. The appeal would therefore be dismissed with costs.

Mr. Justice Smith concurred, but said that as only the question of novation had been decided, he thought the plaintiff had very fairly appealed. It seemed a somewhat hard thing where an Appeal Court reversed the judgment of the Court below on the only question which that Court decided, that the appellant should have to pay his own costs. For that reason he was of opinion that the appeal should be dismissed, but without costs.

Mr. Justice Buchanan also concurred, and confessed that at first he had some doubt as to the question of costs, but said the ordinary practice was that where no substantial alteration was made in the judgment the appeal should be dismissed with costs, and as that was the case in the present instance he concurred in the judgment of the Chief Justice.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

SEAVILL V. COLLEY.

Lex Anastasiana—Promissory note—Cession—Purchase of rights under judgment—Counter claim—Appeal—Practice of the Dutch Courts — Right of retraction — Customs of commerce—Abrogation of laws by disuse—Obligatory force of the body of Dutch laws existing at the beginning of the present century.

Per De Villiers, C.J.—*All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by courts of law, and that debtors do not evade liability in full by reason of their creditors' dealings with their debts, provided only those dealings are bona fide and in accordance with law.*

Now, as to any statute enacted by the Legislature of this Colony, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate it. If such a statute is no longer required, the Legislature, which must be presumed to be acquainted with the body of its own statute laws, is at hand to enact the repeal. But the body of laws introduced from Holland, including Dutch statutes, stand on a different footing. They are not to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory force of the body of Dutch laws existing at the beginning of the present century may be briefly stated. The presumption is that every one of these laws, if applicable to the circumstances of this Colony and not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usage. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by judicial decision, may fairly be held to have been abrogated by disuse. The law of retraction as applied to the sale of debts is inconsistent with the reasonable and well-established custom of persons engaged in commerce in this country, and, until the recent decision in the Eastern Districts Court, it had not been recognised and acted upon by the superior Courts of the Colony, although numerous cases must have arisen to which it was applicable. It had therefore practically been abrogated by disuse and was not revived by that judgment.

The Acting Attorney-General (Mr. Searle) appeared for the appellant.

This was an appeal from a judgment of the Resident Magistrate of Kimberley.

The appellant (defendant in the Court below) was sued on certain six good-fors amounting to £48 19s., and on a promissory note for £23 16s. With regard to five of the good-fors amounting to £32 6s. 6d., appellant pleaded that they had been given before his insolvency and that so much of

plaintiff's claim was extinguished. With regard to the sixth good-for £16 12s. 6d., he pleaded that he had already paid that amount by cheque. He acknowledged his indebtedness on the balance, but counterclaimed for the sum of £40 being the amount of a judgment on a promissory note obtained in the suit of *Borcher* v. *Colley* and ceded by the plaintiff in that case to Messrs. Lyons and Stone on the 22nd October, 1891, the right to which was purchased by appellant from the latter firm for £33.

The Magistrate gave judgment for the plaintiff for £23 16s., with costs and dismissed the counterclaim on the grounds that the note had been paid by Lyons in August, 1891, consequently when Borcher ceded the judgment to Lyons on the 22nd October, 1891, it had been already satisfied and the debt extinguished so far as he was concerned, and that he (Borcher) no longer had any interest therein. (Although not stated in his reasons the Magistrate appears to have been in doubt as to whether an original debt of £40, which had been purchased for £30, could be made the subject of counterclaim for the original amount of the debt namely £40.)

From this judgment the defendant (present appellant) now appealed.

Mr. Searle was heard in support of the appeal.

Cur ad vult.

Postea (Dec. 14.)

The Court delivered judgment.

The Chief Justice said: A most important question has arisen in this case, which although touched upon in previous cases, has never yet been decided by this Court. The question is whether a person to whom a debt has been sold and ceded for less than its amount can recover from the debtor more than the cessionary himself had paid for it with interest from the date of such payment. The Dutch law on the point has been most carefully and exhaustively considered by the judges of the Eastern Districts Court in the recent case of "Deschamps v. Van Onselin."* There was a difference of opinion as to whether that case fell within the well-known exceptions of the general rule of the Dutch law, but I take it that the Judge-President, who dissented from the judgment, agreed with his colleagues as to the existence of the general rule. The rule, according to the weight of authority, was that when a debtor was sued upon a ceded right of action he could, within a year after he became aware of the cession, require the plaintiff to declare on oath what specific amount had been paid as the price and discharge himself by tendering the same amount. This rule is often referred to as the *Lex Anastasiana*, but, as pointed out by Groenewegen (*Ad. Cod.* 4, 35, 23), the constitution of Anastasius and the amending constitution of Justinian had been virtually abrogated by the practice of the Dutch Courts, saving only to the debtor what was known as his right of retraction. Voet also (18, 4, 18) speaks of the rule as having "grown up in our practice," and treats it as a branch of the law relating to retraction. The right of retraction was not confined in the Netherlands to the sale of debts. Over the greater portion of Holland the nearest relatives of a person who had sold his own land had the right, within a year after the sale, to step into the purchaser's place and demand a completion of the sale in their own favour. In Rhineland the nearest neighbours of the seller had the same right. It is not surprising that fetters like these upon the free alienation of property were not generally approved of, and that frequent attempts were made to confine their operations within the narrowest possible limits. "I am not ashamed," says President Bynkershoek (*Qu. priv. jur.* 3, 13), "to confess that, in my opinion, every form of retraction, which is now-a-days in use with us, from whatever source it may have its origin, savours of the utmost unfairness, inasmuch as it robs the purchaser of his honestly acquired right, in order to prop up a policy which is of far less importance than the enforcement of contracts." Sande, in his treatise on the "Cession of Actions" (11, 25), seems to hold that the right of retraction must be confined to such debts as are of a doubtful nature, and he adds that it had been frequently decided by the Parliament of Paris that the Imperial Constitutions already mentioned do not apply to persons to whom liquid or undoubted rights of action had been ceded. If his view and that of other writers whom I have consulted be correct, only such transactions as would, by the English law, amount to "maintenance" were intended to be reached by the law of Anastasius. But I will assume that the general rule, as I have already stated it, formed part of the law of the Netherlands at the time when the first Dutch settlers arrived in this country. Does it then necessarily follow that the rule is still in force in this colony? The first settlers carried with them only those laws which were applicable to the circumstances of the country. The law of retraction, as applied to immovable property, was not general throughout Holland, and I take it for granted that it was never introduced in this colony. Certainly no instance can be found of its recognition. The law of retraction, as applied to debts, was, so far as it went, general in Holland, and there was no reason, arising out of the circumstances of this country, why it should not be introduced here. But it is a notable circumstance that, although no

* For judgment in this case *vide* Appendix.—*Ed.*

transaction is or has been of more frequent occurrence in this colony than the sale and transfer of debts, no decision of any of the Supreme Courts, except the recent case in the Eastern Districts Court, can be found in which the Dutch law of retraction has been recognised and acted upon. This would be no ground, if the law were in itself a reasonable one or consonant with the requirements of commerce, for refusing to recognise it now. But I can see no reason why a debtor should escape liability for the judgment of his whole debt merely because the creditor has thought fit to sell it for less, provided only the sale be a *bona-fide* one. As pointed out by the Judge-President in his judgment, creditors no longer in commerce have the power over their debtors which they had at the time when the rule was introduced. In regard to commercial practice and requirements, if the Court no longer takes the evidence of the *turba testium* or crowd of witnesses mentioned by Dutch writers, it is not debarred by its rules of evidence from taking judicial notice of customs in use among persons engaged in commerce. I should be surprised if there were a single merchant or banker in South Africa who, if he had bought a bill of exchange, whether before or after maturity, for less than its nominal amount, would consider himself foreclosed from recovering the full amount of the bill from the acceptor. All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by courts of law, and that debtors do not evade liability in full by reason of their creditors' dealings with their debts, provided only those dealings are *bona fide* and in accordance with law. If this assumption is unfounded, we are bound to say so, but is it unfounded? An answer to this question involves the discussion of the much controverted point whether or not disuse may modify or abrogate a law admitted once to have been binding. There is a passage in the Digest (1.3,32) which, if taken literally and without qualification, would settle the point "The doctrine," says Julianus, "has been most properly accepted that laws are abrogated, not only by the vote of the legislator, but also by the tacit consent of all through disuse." It would serve no useful purpose to quote the remarks made by the many commentators upon this passage, and upon analogous passages in the Code. Voet (1, 3, 37) would seem to confine the operation of the doctrine to countries in which a democratic form of government prevails, that is, in which the power of legislation rests with the people as distinguished from those in which the power has been delegated to a *princeps*. It is not clear what his view would have been in regard to countries like ours, in which the power is delegated to a representative body elected by qualified electors. He admits, however, that there are instances, and his commentaries are full of such instances, in which well-established laws have been deprived of their obligatory force through not having been acted upon for a long series of years (1, 3, 41). Van der Linden (1, 1, 7) says that customs which are founded on good reason and have been properly proved are not only of force where the written law fails, but have even this force, that they may abrogate the written law. By the written law I presume he means the Roman law as embodied in the *corpus juris*. In his chaper on "Punishments" (2, 2), he mentions several which had been abolished through disuse. He mentions several others as being in use in his time which, although not abolished by our Legislature, would be as impossible at the present time as if they had been actually abolished. Among these punishments are "breaking on the wheel with or without decapitation, whipping with or without the halter on the neck, and with or without being branded with a hot iron, public exposure on the scaffold with or without rods, and the begging pardon of God and the Court of Justice on bare knees." Now, as to any statute enacted by the Legislature of this colony, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate it If such a statute is no longer required, the Legislature, which must be presumed to be acquainted with the body of its own statute laws, is at hand to enact the repeal. But the body of laws introduced from Holland, including Dutch statutes, stand on a different footing. They are not to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory force of the body of Dutch laws existing at the beginning of the present century may be briefly stated. The presumption is that every one of these laws, if applicable to the circumstances of this colony and not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usage. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distictly recognised and acted upon by judicial decision, may fairly be held to have been abrogated by disuse. The law of retraction as applied to the sale of debts is inconsistent with the reasonable and well-established custom of

persons engaged in commerce in this country, and, until the recent decision in the Eastern Districts Court, it had not been recognised and acted upon by the superior Courts of the Colony, although numerous cases must have arisen to which it was applicable. It had therefore practically been abrogated by disuse and was not revived by that judgment. The case with which we have to deal is an appeal from the Resident Magistrate's Court of Kimberley. The defendant, who had been sued on some good-fors and a promissory note, filed a counter-claim for £40 upon a promissory note for that amount, made by the plaintiff in favour of one Borcher, ceded by Borcher after maturity to Lyons & Son, and by them ceded to the defendant. At the time when Borcher ceded the note he appears also to have ceded to Lyons & Son the right to a judgment obtained by him against the plaintiff on the promissory note of £40, but no formal cession of the judgment was made until some months afterwards. The Magistrate held that as the judgment had been satisfied by Lyons & Son, it was no longer capable of being ceded. But the formal cession purports to be made by virtue of an undertaking entered into at the time when the claim was bought. In the absence of proof that such an undertaking was not entered into, there was nothing to prevent Lyons & Son from making a formal cession of the judgment even after it had been paid. In any case the defendant was also the legal holder of the promissory note for £40. This note he had only bought for £30. The question still remains whether the plaintiff would have been entitled to a discharge of his debt by a tender of £30. There is nothing to show, nor has the Magistrate found, that the purchase of the note and judgment was not a real and *bona-fide* purchase. For the reasons which I have already stated, I am of opinion that the judgment should be for the full amount of the note. The appeal must therefore be allowed, and the Magistrate's judgment amended by allowing the counter-claim, with costs in this Court and in the Court below.

Their lordships concurred.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne.]

SUPREME COURT.

THURSDAY, DECEMBER 3.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

DANIEL AND CO V. SIEBERT AND VAN EEDEN.

Provisional sentence — Lease — Arbitration clause—Repairs—Rent.

Mr. Schreiner appeared for the plaintiffs, and the Acting Attorney-General (Mr. Searle) for the defendants.

This was an application for provisional sentence for £8 6s. 8d., rent due under a lease. The agreement of lease contained, *inter alia*, an arbitration clause, by which it was stipulated that all differences arising out of the agreement should be settled by arbitration. It appeared from affidavit that before the lease had expired the roof of one of the out-offices was blown off by the violence of the wind. Upon the plaintiffs (the lessors) refusing to reconstruct the roof the defendants (the lessees) had the work done, deducted the cost from the rent, and tendered the balance to the plaintiffs, which the latter declined to accept. The plaintiffs now prayed for provisional sentence for the entire rent due, and contended that the defendants were, under a clause in the agreement, bound to keep the premises in repair, and that the reconstruction of the roof was a repair contemplated by the agreement.

Mr. Searle: (1) This is not a case for provisional sentence, the lease has expired, and the document upon which provisional sentence is prayed has lost its liquidity. Council referred to "Green & Co. v. Beveridge" (8 Juta, 45). (2) Under the clause in the agreement the parties should have gone to arbitration, "Davies v. The South British Insurance Company" (8 Juta, 416), "Van der Spuy v. The Paarl Bank" (7 Juta, 245).

The Chief Justice: The Court has always held that parties are bound by their agreement, but the question is how far does the agreement extend.

Mr. Searle: In any case the action ought to have been brought in the Magistrate's Court (Act 20 of 1856, sec. 34). (3) The replacing the roof is not a repair. The roof was blown off by a *vis major*. It is a reconstruction, and the lessor is liable for reconstructions and restorations. Counsel referred to "Grotius and Voet," 19, 2, 14.

Mr. Schreiner: The arbitration clause is void owing to its vagueness. No provision has been made for the appointment of arbitrators. The jurisdiction of the Court is not ousted. The case could not have been brought in the Magistrate's Court, as the parties are not within the Magistrate's jurisdiction. Under their agreement the lessees were bound to keep the premises in repair, and were not entitled to deduct the cost of replacing the roof from the rent. Counsel referred to "Van Leeuwen," *Cen. For.*, 4, 22, 10; the Dutch Consultations. Act 8 of 1879, sec. 7, and "Woodfall on Landlord and Tenant," 482.

The Chief Justice gave judgment. In doing so his lordship said that the decisions in Davies and Van der Spuy's cases came briefly to this, that where the parties themselves had agreed to refer disputes to arbitration, and had appointed a tribunal for the purposes of such arbitration, they were bound by the agreement, and could not come into court until they had attempted to act under the agreement. In the present case it was urged that no tribunal was provided. That contention would have been a very sound one if the plaintiff himself had sought to go to arbitration. If he had made such an attempt, and it had been discovered that no tribunal could be found under the agreement, but the plaintiff had not satisfied the Court that any attempt had been made to find a proper tribunal. That being so, the defence which had been raised was a good one. The agreement was clear on the point, and all differences arising under it were to be referred to arbitration, and the defendant was entitled to the benefit of the agreement. Provisional sentence must be refused with costs.

Their lordships concurred.

CASSELL V. SCHUNKE.

Mr. Tredgold moved for provisional judgment on two bills of exchange for £50 and £32 10s. 9d., with interest from 7th October, 1891.

Provisional sentence was granted.

KAFFRARIAN COLONIAL BANK V. SCHUNKE.

Mr. Tredgold moved for provisional judgment on a promissory note for £50.

Provisional judgment was granted.

CAPORN AND MARRIOTT V. ESTERHUYZEN.

Mr. McLachlan moved for provisional judgment for £72 7s. 1d. on two promissory notes, less £10 paid on account.

Provisional judgment was granted.

ADMISSION.

On the motion of Mr. Thorne, Mr. H. G. S. Smith was admitted as a notary and conveyancer.

REHABILITATIONS.

The Court granted the following rehabilitations: Frederic Catly Murray, Christiaan Johannes Britz, James George Reed, and Johannes Wynand Louw de Waal.

GENERAL MOTIONS.

PETITION OF MYRA HARVEY.

Mr. Castens moved for leave to sue *in forma pauperis* in an action against petitioner's husband for divorce by reason of his adultery and cruelty.

The matter was referred to counsel for his certificate.

PETITION OF MARIA MAGDALENA VAN BLERK.

This matter, a petition for leave to sue *in forma pauperis* in an action against Frederick Lucas Lindenberg in respect of the administration of her property, was referred to Mr. Castens for report.

IN THE ESTATE OF THE LATE WM. PATTINSON.

Mr. Tredgold moved for authority to the Registrar of Deeds to cancel certain bonds on security of landed property in Port Elizabeth for balance of purchase price and "kinderbewys" due by the said Pattinsen, the bonds in question being lost, and no claims having been filed in respect thereof.

The Court granted a rule *nisi*, returnable on January 12, calling on all persons concerned to show cause why the cancellation should not be made.

PETITION OF MARKS COHEN.

Mr. Maskew moved for authority to pass mortgage bonds to secure the balance of the purchase price of certain landed property, part of the estate Zonnebloem, bought in trust for petitioner's minor daughter.

The order was granted.

PRINCE V. PRINCE.

On the motion of Mr Jones, leave was given applicant to sue in *forma pauperis* in an action against her husband for divorce by reason of his malicious desertion.

GEDULD V. GEDULD.

On the application of Mr. Tredgold the Court granted a rule *nisi* in this matter returnable on the 10th inst.

SMITH AND CARTER V. VAN STAADEN *ex parte* VAN STAADEN.

Act 20 of 1886, section 33, Schedule B—Refusal of Magistrate to transmit record to Registrar of Supreme Court.

Mr. Juta moved for an order compelling the Resident Magistrate of Matatiele to transmit to the Registrar of the Supreme Court the record in the case of *Smith and Carter* v. *van Staaden* tried before the Assistant Resident Magistrate of Matatiele on the 14th August, 1891.

It appeared from an affidavit of the defendant's attorney that an appeal had been duly noted and the sum of £1 17s. 6d. paid as security for the costs of the appeal in terms of section 38, Schedule B., Act 20 of 1856.

On the 22nd October, 1891, on an application being made by the plaintiff the Magistrate ordered the defendant to find security in the sum of £50 for the costs of the appeal, and refused to transmit the record until such security had been found.

The Court ordered the Magistrate to transmit the record to the Registrar, the question of costs to stand over.

GLADSTONE V. GLADSTONE.

Mr. McLachlan for petitioner; respondent in default.

This was an action for restitution of conjugal rights, brought by the wife. The marriage having been formally proved by Mr. Norman Lacy, of the Colonial Office,

Mrs. Gladstone deposed that she was married to respondent on April 3, 1884. There were two children of the marriage, and witness had been left also with two children by his former wife. She had been keeping both her children and those of the former wife. Last year her husband was in Cape Town, as the result of which she lost a good situation. She was now at work, and prayed for the custody of her own two children. She had no objection to keeping the other children as well. Her husband was somewhere in Mashonaland she believed. He had sent her no money for a very long time.

An order for restitution of conjugal rights was granted, the respondent to return not later than the last day of February, otherwise a decree of divorce would be granted.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne.]

REGINA V. STODARD.

Act 28 of 1883—Contravention—Conviction—Evidence—Appeal.

Mr. Schreiner for the appellant; Mr. Searle for the Crown.

This was an appeal from a conviction before the Resident Magistrate of Cape Town on a charge under the Liquor Licensing Act of 1888. Counsel stated that appellant had been fined £5 for an offence of which there was not the slightest evidence. The testimony in the case was very brief. P.C. 82 deposed, when the case was before the Magistrate, that on a Sunday evening he went to the defendant's premises, the Sarsfield Hotel, and saw defendant remove some bottles from a table. When he knocked at the door, defendant looked through a curtain and went away. It was some time before he was admitted. When he entered everything was cleared away, except a bottle of beer in front of a man named Black, or Bruyns. P.C. 43 gave evidence that he went to the back door, and saw two coloured men endeavouring to get away. The man Bruyns deposed that he was a relative of the defendant, and called on him on the occasion of the seizure. Stodard gave him a glass of beer, for which he paid nothing. Whilst he was there several men came to the door, but defendant would not admit them. Counsel submitted that the defendant was fined upon wholly insufficient evidence.

The Chief Justice said there could be no doubt that liquor was consumed by a person other than the occupier. There was a clear presumption, therefore, that there had been a sale, but it was said by the man Bruyns that the liquor was given, not sold. The Magistrate did not believe him, and that officer was the best judge as to whether he was to be believed or not. He thought that if he had been in the Magistrate's position he would have arrived at the same conclusion. The appeal would be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

FRIDAY, DECEMBER 4.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

PETITION OF HENDRIK VAN NIEKERK.

Mr. Schreiner moved for an order ratifying certain agreement as to the disposal of the property

bequeathed by the joint will of petitioner and his predeceased wife, entered into with beneficiaries under the will.

Mr. Searle appeared for Mr. C. A. Horne, the guardian of a minor interested, who offered no objection.

The order was granted.

GARDNER V. TEAGUE AND GRAY.

Agency—Commission—Tender—Costs.

Plaintiff in person; Mr. Juta for the defendants.

This was a action on an account stated between the parties. An arrangement was made by which plaintiff was to receive certain commission on the sale of snoek. He claimed to have sold 5,000 snoek, earning £20 19s. 8d. as commission, whereas defendants stated that the plaintiff had sold a smaller quantity, and was only entitled to £11 12s. 10d. The other item in dispute was as to whether plaintiff had received an item of £52 16s., or, as he contended, only £45 10s. The actual amount in dispute was £16 12s. 10d. The defendants claimed an account, supported by vouchers, from the plaintiff.

Plaintiff deposed that in February last he had a conversation with Teague & Gray, who asked him to take over an agency of theirs. In the end a verbal arrangement was arrived at whereby witness was to pay them £50 for the agency, and to receive 1d. on each snoek he sold, and 5 per cent. commission on smaller fish. He paid £25 down, and subsequently paid the other half. Teague suggested that he should purchase Gray's share, but Gray refused to sell it; whereupon witness offered to buy Teague's share for £75, but the sale did not take place, Teague asking for £100. The defendants had represented to him that the catch was 10,000 snoek per month during the season, but it had not been nearly so much. Witness owed defendant nothing, having paid over to them all the money he ever received on their account. He had kept no books regarding the transactions; they were not necessary. The fishery was near Cape Point, and it had been proposed to sell it to a syndicate for flotation into a public company.

By Mr. Juta: He had no receipts showing the payments he had made to Teague & Gray. He kept books for his produce business, but not for the fish agency.

Charles Gray, one of the defendants, stated that an arrangement was made during March by which plaintiff was to pay £100 to the firm, and receive 5 per cent. on small fish and a penny each per large snoek. Plaintiff was to render a statement each month. In April there was a disagreement, as the result of which the firm refused to consign further supplies to Gardner. Plaintiff had only paid £50 of the £100 due in respect of his agency, a cheque for £15, drawn by Gardner, having been dishonoured. He at no time agreed to pay Gardner commission on the fish sold during April.

Cross-examined: It was not true that witness and his partner were unable to meet their liabilities when the agency was arranged. He could not swear that he had not said the amount of snoek reached 10,000 per month, but the whole of the fisheries on the local coast had been a failure during the past season, and Teague and Gray had suffered severely with others.

Thomas Teague, the second defendant, corroborated the evidence of his partner, and stated that plaintiff was wrong when he said that all he had to pay was £50. He agreed to pay £100, and actually paid £60. In April plaintiff was unable to pay the balance of the £100, and said he would be compelled to retire from the agency but in May, when Gardner said he was earning no money, Gray allowed him commission on that month, out of kindness. Witness had repeatedly applied to plaintiff for an account, but had never succeeded in getting one.

Cross-examined: Plaintiff had never offered to refer the case to arbitration. The firm had no desire to keep any money belonging to plaintiff, but did not know the true position of affairs, owing to plaintiff's failure to render an account.

The Chief Justice, in giving judgment, said that in regard to commission the plaintiff had admitted that during the month of April the arrangement was suspended, but he had charged commission notwithstanding. In regard to the £45 10s. the defendants stated that that was all they received, and they supported the statements by books and receipts, whilst the plaintiff, despite his fiduciary capacity, had produced no books, receipts, or accounts. The onus was upon him to prove that he had paid more than £45, and under the circumstances the tender of £37 12s. 11d. was quite sufficient. The plaintiff had only himself to thank for his position. Judgment would be for the plaintiff for £37 12s. 11d., with costs up to the date of tender, but plaintiff must pay all the costs from date of tender.

[Defendants' Attorneys, Messrs. Reid & Nephew.]

ALING V. BELLEVUE SYNDICATE.

Company in liquidation — Shares — Calls—*Locus standi* of liquidators appointed at a meeting of shareholders called for the transaction of general business — Exception—Appeal.

Mr. Schreiner for the appellant (defendant in the Court below); Mr. Juta for the respondents.

This was an appeal from a decision of the Resident Magistrate of Worcester, in a case brought

by the liquidators of the Bellevue-Zoutpansberg Prospecting Syndicate against appellant for the recovery of £3, being the amount of three calls on a share in the syndicate.

It appeared from the evidence taken before the Magistrate that a meeting of the shareholders of the syndicate had been advertised to be held for the transaction of general business; but nothing was said in the advertisement relative to placing the syndicate in liquidation At the meeting, however, liquidation was resolved upon and liquidators appointed.

The defendants' attorney excepted:

1st. To the plaintiff's right and power to sue inasmuch as the meeting of shareholders referred to in the summons did not in law or by the alleged basis of constitution of the alleged syndicate possess the power to resolve upon liquidation and elect liquidators, and;

2nd. That the usual formalities were not observed in calling up the several instalments as they became due by shareholders.

The Magistrate overruled the exceptions and gave judgment for the plaintiffs with costs. From this judgment the defendant (now appellant) appealed.

Mr. Schreiner: The plaintiffs had no *locus standi* as the meeting at which they were appointed, had no power to resolve upon liquidation and elect liquidators. No right exists by common law in a majority of partners at any time to compel a minority to assent to liquidation.

Mr. Juta was heard for the respondents.

The Chief Justice gave judgment. In doing so his lordship said that the exception taken in the Court below was of a purely technical nature, and he confessed he would have been glad if he could, consistently with the law, have dismissed it and upheld the Magistrate's view, but it appeared to be too clear and plain, that under the contract to which the defendant became a party when he took over the share, the only persons appointed to manage the concern were the directors, and that therefore, if anyone were entitled to sue under the contract, it was the directors. It was possible, also, that an argument might be raised that the secretary and treasurer might have been entitled to sue under the contract, but that had not been done. The plaintiffs were certain liquidators appointed at a meeting of shareholders convened for general business, and not to consider the question of liquidation; but even if the notice had been to the effect that liquidation would be considered at the meeting, he would not have been satisfied that any liquidator would have the power to sue. There was no provision in the trust deed authorising a majority of the shareholders to appoint liquidators with power to sue shareholders for their calls. But it now appeared that there was not even a majority of shareholders present at the meeting. Under those circumstances it was clear that the exception was a good one, and the judgment of the Court below would be reversed, with costs in this Court and in the Court below.

[Appellant's Attorneys, C. C. Silberbauer; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

MONDAY, DECEMBER 7.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

RESID V. ABADER.

Account—Action for—Commission on sales—Tender—Costs.

Mr. Schreiner and Mr. Molteno for the plaintiff; Mr. Searle and Mr. Joubert for the defendant.

Plaintiff, in this case, a Persian by birth and a priest of the Malay community, claiming to be a lineal descendant of the Prophet Mahomet, came to South Africa some years ago in the exercise of his priestly functions.

Finding the emoluments of a priest insufficient for his requirements he commenced a speculative business. He did not trade personally, but advanced money and goods to other persons for the purpose of trading, partly to plaintiff's profit. Amongst others to whom he so advanced money was the Hadje Magomat Abader, with whom he was on terms of intimate friendship. It appeared that about the end of 1889 and the beginning of 1890 plaintiff was in Cape Town, and then placed in the hands of defendant certain moneys to be used in a speculative manner on joint account, the business to be carried on being the making and disposal of carts. Plaintiff also placed in the hands of defendant certain accounts for collection, and supplied him with certain goods for sale. In January, 1890, a document in Arabic was drawn up in defendant's books, indicating the position of affairs between plaintiff and defendant, and the books were then sealed up in the presence of witnesses. Plaintiff also held a receipt signed by defendant, in which he acknowledged that plaintiff had given him certain money "to make money with." Plaintiff failing to get a statement of account from defendant on several occasions offered to submit the matter to arbitration, but

defendant always refused to take that course, when plaintiff decided to take the case to the Court. Plaintiff claimed £229 15s., the final amount in dispute, and also a detailed account of the transactions in question.

Plaintiff deposed that he was educated at Bagdad, and had been about three years and a half in South Africa. He had acted as a priest at different towns, making up his income by trading. He knew defendant well, having stayed some time at his house. When he first came to Cape Town he brought £150, and placed it out with defendant wherewith to trade. He wrote a document in Arabic, a copy of which was posted in defendant's book in his presence, and at the same time a receipt was signed stating that he (defendant) owed witness £274 2s. The receipt set forth the exact business relations between defendant and plaintiff. In 1889 Abdol Hadie and witness entered into a partnership, witness contributing £100 and Hadie a similar sum. When he wrote the receipt showing the business relations of defendant and himself the £100 paid to Hadie was not included. When witness went away from Cape Town Hadie was in the Transvaal, and had not returned witness his £100, and witness asked defendant to act as his agent for the collection of the money, but the matter had no connection with the receipt of £274 2s. Abader did not collect the money from Hadie, nor did he return the papers until repeated applications had been made for them. Witness was recently married, and the ceremony took place from defendant's house, but latterly there had been some differences between them on account of a religious dispute, in which they took opposite sides.

Cross-examined: Since January, 1890, he had put his seal to all writings he gave to the people, and if defendant put in any receipts not sealed they were not binding. There might be some receipts he could not recognise; some of his writing he knew, and some he did not. It was true that in Natal he was hard up, but he did not ask Abader for the money he had lent him for the reason that he expected to be in Cape Town himself soon after. He had never borrowed money from Hadji Magmoet. He appointed Abader his agent for the purpose of collecting certain moneys, but did not agree to the payment of a 5 per cent. commission for collecting. Defendant did not lend him money to give to Mustapha, witness's wife's father. He gave Mustapha £20, £10 at the mosque, in presence of the priest, and £10 at his home, but it was all his own money, not borrowed from defendant.

Adam Gool Mahomet, an Indian merchant, said he had known plaintiff ever since he came to the Colony. He had seen in a book of Abader's a statement of the account between plaintiff and defendant, but that book had not yet been produced in court. Defendant on one occasion promised to bring his book for plaintiff to examine, but he had not done so.

Cross-examined: He could not say if plaintiff was short of money when these transactions took place.

Joseph Gool, another Oriental trader, said that on one occasion Abader produced a document purporting to be signed by plaintiff. Plaintiff immediately said that the signature was not his, and witness thereupon closely examined the document. It was freshly written with blue-black ink, and had evidently not been written many hours, although, if the document were genuine, it had been written many months.

Cross-examined: Abader admitted that the document was not genuine, and he promised to bring the real paper next day.

Abdol Kariem deposed that about a couple of months ago he met defendant on the Parade, when he said that if witness would try and settle the dispute without going to Court, he would be glad. He promised to do what he could, and was present when defendant produced the document, the genuineness of which plaintiff at once denied.

Cross-examined: On the day when the plaintiff denied that the document was genuine, defendant promised to produce his books the next day. On that occasion defendant admitted that plaintiff had made an entry in his (defendant's) book.

Mahomet Abrahams said he was also present when the document was presented. Plaintiff at once denied the signature. Witness's own opinion was that the document was not genuine.

The defendant, Hadji Mahomet Abader, said his first business with plaintiff was done in January, 1890. Plaintiff asked witness to be his agent for the collection of his accounts. Witness said he would charge 5 per cent., and plaintiff said that would do. Plaintiff gave him a certain paper, which he signed in witness's presence. That was the list plaintiff now denied signing. Eventually he also agreed to sell goods on plaintiff's account at a similar commission, the profit on the transactions had been something over £35. He found very great difficulty in selling the goods consigned by plaintiff, and finally they were sold by public auction.

The evidence was very voluminous as to the details of the account.

SUPREME COURT.

TUESDAY, DECEMBER 8.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

VAN RENEN'S TRUSTEE V. ABEL.

Insolvency—Ordinance 6 of 1843, section 84—Act 38 of 1884, section 8—Contemplation of sequestration — Undue preference — Transaction in the ordinary course of business—Collusion—Forfeiture.

Mr. Schreiner and Mr. Graham for plaintiff; Mr. Searle and Mr. Molteno for defendant.

This was an action instituted by the trustee in the insolvent estate of Willem Carl van Renen against Mr. Richard C. Abel. The estate was placed under sequestration on May 14, 1891. It appeared that in November, 1890, a promissory note for £130 was held by defendant as creditor of the insolvent, his two brothers, and one Liedenmann. The three brothers Van Renen had since all become insolvent. In November, 1890, £25 was paid off the note, and then an arrangement was alleged to have been entered into by which five mules, a wagon, and a cart were taken over by defendant from Van Renen. They were held some days by defendant, and then returned to Van Renen and his brothers, who continued to use them at their farm near Hopefield. The insolvent thereafter remained in possession of the property. Subsequently two of the mules were sold, and Van Renen was alleged to have thereafter been compelled by defendant to substitute four mules for the two that were sold. There remained in the possession of the insolvent one mule and the wagon and the cart, which he kept till he was on the verge of insolvency. Just before the surrender in April it was alleged that Abel took away the property. In September, 1890, Van Renen had prepared his schedules, but they were afterwards withdrawn, though there was never a moment from that time until insolvency when the insolvent did not contemplate surrendering his estate. The plaintiff claimed that the transaction was null and void, and merely collusive and fictitious, and that the true intention of the transaction was an endeavour to give security and undue preference. Plaintiff claimed a forfeiture of the articles under the Insolvent Ordinance.

The defendant pleaded that £25 cash was paid on account of the note, and that during 1890 certain mules and carts were purchased from the three brothers, in connection with the payment of the balance of the amount due on the note. Defendant admitted that about September, 1890, the insolvent contemplated the surrender of his estate, but that thereafter satisfactory arrangements with his creditors were made, and that he was then solvent. The brothers agreed to hire back the property at 4s. 6d. per day, and did so. Defendant further pleaded that the transaction was perfectly *bona fide* and open, known to the other creditors, and free of collusion or undue preference.

The insolvent, W. C. van Renen, deposed that in September, 1890, he consulted a Mr. Stigling with regard to drawing up witness's schedules for the surrender of his estate. Defendant knew of the intention to surrender, and was present at the discussion at Stigling's office. He did not know if at that time his brothers intended the surrender of their estates. He and two brothers farmed on a farm belonging to a Mr. Fick, situated near Hopefield. Witness also rode transport as well as carrying on farming business. In connection with the transport-riding there was a claim of £72 by one Steyn, for oxen, and Steyn was pressing for payment. Eventually Steyn took back the oxen by arrangement with witness. At that time witness could not have paid his creditors. From the time of this transaction to the date of the sequestration witness could never have paid his creditors. He owed a good many debts, and his assets comprised merely the stock on the farm, the implements, and the crops. The rent was £60 per year, and he was responsible for his share. Defendant held a note which came due on November 23, 1890, for which witness was liable with others. Neither he nor his brothers were able to pay the note. He remembered that defendant came to the farm several times when the note was about falling due About that time he met the defendant at Stigling's office, in the presence of Stigling, one Gallagher, and witness's two brothers. When defendant demanded the money witness said he could not pay anything beyond the £25, which had been paid off before that time. Eventually witness agreed to give five mules, a wagon, and a cart as security for Abel's debt, Abel remarking that when they had handed the property over they could have the use of it again. The property was handed over, and a receipt signed by witness and his brothers, but no money at all passed, and Abel never returned the promissory note. Abel then said that in a couple of months they could pay the debt and have the cattle again. Witness confessed that afterwards he sold two of the mules to pay a debt contracted at the bank. He did that although he knew that the mules were pledged to Abel. He was very sorry for having sold them. When defendant got to know of the

transaction he was angry and said he could do witness a great deal of harm. Defendant compelled witness to deliver four other mules in place of the two which had been sold. In April, when the schedules were in preparation, defendant took away the cart and wagon. During the whole time that elapsed from the commencement of the transaction with Abel witness never had any other intention than to surrender his estate.

Cross-examined by Mr. Searle: Among other creditors pressing him during the period covered by the transaction with Abel were the Western Province Bank, Steyn, and one Schroder. He did not know for what precise amount. In fact he did not clearly know what his position was till September, when schedules were prepared, but afterwards these were cancelled on an amicable arrangement with Steyn being come to. It might be true that a Mr. Samuel Abel was a creditor for two promissory notes; he did not remember it. He thought that all the credit he received from Mr. S. Abel was for 2s. Now that he recollected, he admitted that Samuel Abel lent him money on bills to help him to carry on. The money passed early in 1890. Part of that money, £99 odd, went to pay another creditor. When defendant's bill was falling due the crops were nearly ready, but they were not very good. He could not say what the crops were worth; perhaps about £800, taking them at a liberal valuation. He knew something about the farm, but was not always working on it. He helped to harvest the crops. He believed that on December 1, 1890, he was insolvent, but he confessed that he did not know what he owed at that time. He was sure he could not have paid all his debts, but confessed he did not know what either debts or assets were. He did not tell Stigling at that time that he was solvent. He did not remember borrowing money from Stigling at that time. He was not aware that one of his brothers got back the promissory note passed to Abel When he sold the two mules he did not know he had no right to sell them, and he gave four back because he was afraid, Abel having said he would put witness on the Breakwater. In April, 1891, Abel took away the rest of the mules and the wagon and the cart. In January and February, 1891, he knew he was insolvent. Mrs. Fick at that time sold him some mules and a wagon for £110, but the sale was provisional, and the property was given back when he could not pay. He did not know that on December 1, 1890, the cart was actually at defendant's house.

Re-examined: After September, 1890, he incurred no large fresh debts. When he desired to surrender his estate, at the meeting at Stigling's office, Stigling said that he could not prepare schedules and then withdraw them and present them again, otherwise he would get into trouble.

The Chief Justice asked witness if he intended to surrender all along, why he didn't do so.

Witness said he could only reply that he was confused and afraid, and did not know what to do.

By the Chief Justice: He made the sale to defendant in December, 1890. He could only say that the reason why he pledged the things to Abel was because Stigling advised him. He knew that the effect would be to give Abel a preference over other creditors.

Johannes Petrus van Renen, another of the brothers, stated that he had heard his brother's evidence, and corroborated it. He was now insolvent, and could not have met his debts at the time of this transaction with Abel.

Mr. F. F. Werdmuller, who prepared the schedules and acted as trustee, deposed that independently of goods recovered from creditors the actual assets in the estate were only worth £11. The total liabilities proved were about £410, but there were many other claims not yet proved. The crops were reaped before insolvency. About twenty bags only were obtained.

Thomas Gallagher, Court messenger at Hopefield, gave evidence regarding a conversation which took place in his presence, in the course of which it was agreed that the Van Renens were to hand the mules and the cart and wagon to Abel as security for his debt. A pretended sale was to be gone through, but no money passed, and Abel afterwards said that the brothers could have the cattle back, but must appear to go through the process of hiring them. Abel told him that he knew the Van Renens were in a bad position, and that he meant to have the first pull. At the time of this transaction the Van Renens could not have paid half-a-crown in the £.

By Mr. Searle: He made an examination into the Van Renens' position, and considered that they were insolvent at the end of last year. He considered that the crops were worth £400 or £500. Before the Van Renens signed the documents offered by Abel, their nature was explained to them. Willem van Renen never told witness, after September, 1890, that he was solvent. In November, 1890, witness stood security for Willem van Renen for £37 10s. He did that because the insolvent promised witness a horse, saddle, and bridle. He got what he was promised. He could not help admitting that although he supposed he would get into trouble for it now that matters were in court. He only took this action because Willem van Renen told him that some of his creditors would take 10s. in the £, and witness thought if that were done the Van Renens would pull up. He did not pay the £37 10s.; but he kept the horse. In witness's opinion the transaction with Abel was not open, but secret. The secret consisted in Abel's saying that he did not want the mules, but the money.

Corroborative evidence for the plaintiff having been given by Mr. and Mrs. Fick, Mr. Steyn, and Mr. S. Abel,

The defendant, Richard Cornelis Abel, deposed that he was a dealer in cattle; farming stock and implements. In August, 1889, he sold some cattle to the Van Renens, and got their promissory note for £130 10s. At that time the Van Renens were solvent. He was aware that in September, 1890, Willem van Renen prepared his schedules on account of the pressure of Steyn, but when the latter took back his cattle witness took the brothers to be perfectly solvent. The promissory note was not paid on the due date; afterwards he saw the brothers and asked for the money.

The Chief Justice said that with regard to the point of collusion, he had come to the conclusion that it would be difficult to hold that collusion took place. The real point to which counsel should address themselves was as to the intention of the insolvent—whether he contemplated insolvency all along as the plaintiff contended.

Witness, continuing, said that at the time of the transaction Willem van Renen was a fully solvent man. The crops were splendid, and it was believed that when the harvest was garnered the brothers would be quite clear. Witness estimated that the crops then promised to yield 900 muids of oats, 500 muids of wheat, 250 of rye, and over 100 of barley. The value would be between £600 and £700. Witness thrashed for them in January, when the greater part of the corn had been taken away, and he got over 200 muids of good, fat corn, whilst the brothers had sold large quantities to Stigling, one Ackermann, and a miller at Hopefield, and others. He heard Willem van Renen say in September, 1890, that he was fully solvent, and could pay his creditors five times over. He got the hire money for the cattle and carts regularly, and there were receipts in existence showing that.

By Mr. Schreiner: It was true that he wished to secure himself, but Gallagher had misreported the conversation that took place between witness and him. All the credit that Willem van Renen obtained from witness in November and December, 1890, was £5 8s., but if Van Renen had asked for more witness would have given it. Witness did not say to Fick that of course he was first, as the landlord, but that witness desired to come next.

Mr. J. W. Stigling, agent, deposed that when he drew the schedule of liabilities on the first occasion, in September, 1890, the deficiency of Willem van Renen was very small indeed, and when the Steyns withdrew their claim and took their oxen back, Van Renen became solvent. Witness's belief in the solvency of the Van Renens was best shown by the circumstance, that after December 1, 1890, he lent them nearly £60.

By the Chief Justice: Witness was the agent of Stephan Bros., and made the advance on account of the expected harvest, as was his custom. He got grain in payment of the money.

By Mr. Schreiner: He had heard Gallagher's evidence as to what took place on December 1, and he contradicted it. He advanced the £50 odd in September, November, and December; £10 was paid in the latter month.

By Mr. Searle: There was not the smallest secrecy about the transaction of December 1.

Mr. Frank Hughes, another agent practising at Hopefield, stated that when he asked Willem van Renen how he was going to pay defendant, he replied that the crops were excellent, and that the brothers could pay their liabilities five times over.

Robert van Renen, one of the three Van Renens who gave the promissory note, deposed that in November, 1890, he and his brothers were not able to pay their creditors, but when the Steyns withdrew their claim, all was right. The transaction of December 1, 1890, was suggested by Willem van Renen. After that the document of hire was drawn up. Abel took the mules and carts back in April last.

By Mr. Schreiner: He admitted having told Werdmuller that no money had been paid on account of the hiring agreement, and that the document was a sham. When he went to Werdmuller, in January or February of the present year, he then told Werdmuller that he and his brothers had been practically insolvent for nine months. He and Willem agreed to say, when the wagon was sent to Abel, that it was only going to be repaired if Fick asked why the wagon was being moved.

By Mr. Searle: Mr. S. Abel had promised to lend him six mules to work with. When he was at Werdmuller's, early this year, and said he had been insolvent nine months past, he was frightened, Fick having threatened to send witness to prison.

Gustav Willem Liedemann, one of the joint signatories of the note, C. J. Louw, J. M. Slaabe, and G. Kleinsmit also gave evidence.

SUPREME COURT.

WEDNESDAY, DECEMBER 9.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

VAN RENEN'S TRUSTEE V. ABEL.

Mr. Schreiner and Mr. Graham appeared for the plaintiff, and the Acting Attorney-General (Mr. Searle) and Mr. Molteno for the defendant.

The hearing of this case was resumed.

Mr. Searle contended that there was not the slightest proof that defendant was intended to have been preferred, whilst with regard to the contemplation of insolvency the evidence of the insolvent was highly unsatisfactory and inconclusive.

The Chief Justice, in giving judgment, said that the questions to be determined in the case were, first, whether on December 1, 1890, when the first document was signed, there was a contemplation of sequestration on the part of the insolvent. The next question was whether he had at that time, by the particular transaction now impeached, intended to prefer the defendant; and the third question was whether the transaction was in the ordinary course of business. As to the first, the Act of 1884 said that in case the insolvent's assets were less than his liabilities, or the transaction impeached took place within six months before insolvency, then the presumption should be taken as in favour of insolvency; a presumption, however, which might be rebutted. In the present case they might take it that there was a contemplation of sequestration on December 1. That contemplation had not been rebutted in any way by the evidence; on the contrary, the evidence showed that there must have been a contemplation, inasmuch as a few months before the insolvent had actually sent in his schedules, and was only relieved from insolvency by giving up the very cattle in respect of which he was being sued by the then creditor, Steyn. In his opinion the insolvent's assets were really less than his liabilities then and afterwards. The next question was, did he intend to prefer the defendant above his other creditors? If once it were established that sequestration had been contemplated, then it almost followed as a matter of course that any particular transaction by which any creditor got a preference was intended to have that effect by the insolvent. Of course there might be cases in which there was the general intention of sequestration without any particular wish to prefer any one creditor, but in the present case, in addition to all the facts going to show that there must have been an intention to prefer, they had insolvent's own statement that that was his object, and that in case sequestration took place, defendant should have a preference. That was what insolvent's admission came to, and that being supported by evidence, ought to be taken as conclusive. He did not say that the mere fact that the insolvent said he intended to prefer was conclusive, but the Court had also the other facts in the case to the same effect. Then the defendant said the transaction was in the ordinary way of business. Well, he confessed that to his mind it appeared to have been quite out of the ordinary course of business. There was the promissory note; when it fell due only £25 had been paid on it; there was no renewal, and then this secret arrangement was made quite out of the ordinary course of business. When once the contemplation of sequestration had been shown it was for the creditor who made the transaction impeached to show that it was in the ordinary way of trade. It was not enough to say that in the village such transactions were common, or that between themselves there had been such dealings before; the creditor must shew that his action had been such as would be taken by commercial men of repute, and in the present case, although the transaction was not so fraudulent as to amount to collusion, it was yet a secret arrangement, and an arrangement which the Court could not in any way sanction. As to the point of collusion, he did not think it necessarily followed that defendant knew the full state of the insolvent's affairs; the insolvent must have known, but that did not show that the defendant had full knowledge or acted in a collusive manner. The judgment of the Court would be for the plaintiff in terms of the prayers A and B of the declaration, but the amount not to exceed £57 10s.; the defendant was to return the five mules, the wagon, and the cart, but there would be no decree as to forfeiture. Costs for the plaintiff.

[Plaintiff's Attorney, C. C. de Villiers,; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

QUIN'S EXECUTOR V. QUIN.

Executor—Failure of duty—Action to frame accounts — Damages — Costs *de bonis propriis*.

Sir T. Upington and Mr. Juta for the plaintiff Mr. Schreiner and Mr. Webber for the defendant

This was an action brought by Mr. Wm. Divine of Fort Beaufort, executor of the late Mary Ann Quin (born Divine), against the defendant, W. J. Quin, executor with the late Mrs. Quin in the administration of the estate of the late Hon. J. Quin, of Fort Beaufort, to frame a correct account, supported by vouchers, of his administration as managing executor of the estate of the late Mr. Quin, and to pay into the estate of the late Mrs. Quin, his mother, the amount to which her estate was entitled under the provisions of the will of her deceased husband; or, in the alternative, that the defendant pay to the plaintiff the sum of £3,549 4s. 9d., for the benefit of the estate of the said late Mrs. Quin.

The will of the late Hon. John Quin provided that the executors (his widow and eldest son), as soon as convenient after the death of the testator, but not later than two months, should make a full and true inventory of the effects and goods,

movable and immovable property in the estate, the same to be fairly valued and appraised. After framing the inventory and paying debts, the executors were to frame an account and equally divide the balance, one half-share to go to the widow and the other to certain legatees. (The present case was concerned with the widow's half-share.) The will went on to state that the estate was not to be sacrificed, but worked for the common good of the widow and the other heirs, on condition that the executors should pass a bond for the full amount of the assets. Mr. Quin died on June *b*, 1880, and it was alleged that thereafter, as soon as the will became in force, the widow entrusted to the defendant the entire administration of the estate. It was then alleged that defendant failed to draw up a full and true inventory and appraisement, but filed an account, purporting to be an administration account, with the Master in March, 1882. The account was alleged to have been filed nominally by both executors, but in reality by defendant, and it was stated in the declaration that such account was insufficient, misleading, and incorrect. The value of the estate, it was further alleged, was much larger that the amount set down by the defendant. Mrs. Quin died on November 30, 1889, having made a will whereby the plaintiff was appointed sole executor, who now alleged that the estate had suffered by reason of the dealing of the defendant, as acting executor, with the estate of his late father.

In his plea, defendant admitted filing an account with the Master, as alleged, but said that the account was true and correct, and approved by his co-executor. Defendant pleaded that his late mother took over the estate, and received all the documents connected with it during her lifetime. Defendant set forth that during the whole time he acted with the knowledge and approval of his co-executor, and in an open and *bona-fide* manner.

The Chief Justice said he did not see how, unless fraud were alleged, the plaintiff could now impeach the accounts to which Mrs. Quin was a party, and which she signed as correct in her capacity as co-executor.

Sir T. Upington said that was so, but that there were many sums received by the defendant which did not figure in the accounts at all.

Mr. Schreiner said he was prepared to meet his learned friend on that ground.

The evidence of defendant, taken on commission at Johannesburg, was then read. The testimony, which was very voluminous, stated among other things that the property in the estate had been greatly overvalued. Deponent's father valued the estate at about £4,500, but a hotel property, set down as worth £500, only realised £200 when sold. Deponent's late mother had the estate handed over to her at her own request, and deponent had acted throughout with her approval and consent.

Cross-examined, deponent stated that his late mother took over the estate in September, 1881. No bond was passed by the executors in accordance with the will. Deponent yielded to his mother's wishes in whatever was done. He could not say who was present when his mother took over the estate, nor was the arrangement reduced to writing. Deponent's mother did not leave the entire management of the estate to him.

The Chief Justice suggested that in view of the admissions of the defendant in cross-examination counsel for the defendant should agree to judgment being given for the amount of his property in the Colony.

Mr. Schreiner was afraid he could not do that in the absence of instructions from his client to that effect unless judgment for the value of the property attached should have the effect of *res judicata* as between the parties.

The Chief Justice: What is the value of the property attached?

Sir T. Upington: Possibly not £100 altogether.

The Chief Justice: What are the circumstances of the defendant?

Mr. Schreiner: Very depressed indeed, my lord If the Court would say that the surrender of the Colonial assets would settle the matter then I shall advise Mr. Quin to accept the offer, but it must be understood that Mr. Quin is not to be sued further by the executor.

Mr. Wm. Divine the plaintiff, Mayor of Fort Beaufort, gave evidence that with regard to certain books defendant said he had left at Fort Beaufort they were not now there, he having taken them with him to Johannesburg. Defendan took away the safe and the title deeds of the property with him. At the time of Mr. Quin's death the Fort Beaufort *Advocate* was carried on at a profit.

Cross-examined: During her lifetime Mrs. Quin frequently complained to witness that her son had not properly carried out his duties as executor. Landed property in Fort Beaufort had depreciated somewhat, but only since the opening-up of the Gold-fields.

After argument,

The Chief Justice gave judgment. In doing so his lordship said that the case was one in which every presumption ought to be made against the defendant, who had clearly failed to do his duty as an executor in accounting for the several large sums of money received by him on behalf of the estate. He was quite satisfied that if a full account were prepared it would be found that over £1,000 was due to the plaintiff from the defendant in his capacity as executor of his late mother. What that amount actually was it would be difficult to say without going into a more careful scrutiny of the accounts than the Court could possibly make then. In view of the decision

of the plaintiff and his advisers, however, the Court would give judgment for the plaintiff for £1,000, with costs *de bonis propriis*.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, Gus Trollip.]

SUPREME COURT.

THURSDAY, DECEMBER 10.

[Before the Chief Justice (Sir J. H. DE VILLIERS K.C.M.G.), Mr. Justice SMITH, and Mr Justice BUCHANAN.]

PROVISIONAL ROLL.

LEWIS AND CO. V. SCHMIDT.

Mr. Tredgold moved for provisional judgment on a cheque for £11 10s., less £5 paid on account.

The Chief Justice asked if the cheque had been fully presented for payment at the bank.

Mr. Tredgold said no, but that the cheque had been referred to drawer. There had been no formal presentation.

The Chief Justice ordered the case to stand over.

SEARLE AND CO. V. STANDER.

Mr. Molteno appeared for the plaintiff, and moved for provisional sentence for the sums of £18 18s. 5d. and £1 17s. 5d.

Mr. Juta appeared for the defendant, and asked for a postponement, but

The Court intimated that the case had better be proceeded with.

Mr. Juta remarked that the property in dispute had ceased to belong to the defendant, having been sold to one Anderson.

Mr. Molteno read affidavits to the effect that the sale was underhand, and made for the purpose of defeating the rights of the plaintiff. Counsel stated that Anderson's debt was only £19, whereas plaintiff was willing to give £75 for the property alleged to have been conveyed to Anderson in satisfaction of his claim.

The Chief Justice: When did the alleged sale take place?

Mr. Molteno: On October 15, a day after demand was made.

The Court granted provisional sentence and a rule *nisi*, returnable on the 12th January, calling upon Anderson to show cause why the property alleged to have been sold to him should not be declared executable.

LIQUIDATORS WITKOP SYNDICATE V. KLEINSCHMIDT.

Mr. Watermeyer moved for provisional judgment on unsatisfied debt for £80 3s. 9d., less £32 2s. 3d., with interest.

Provisional judgment was granted.

DARTER BROS. AND WALTON V. D. M. BRESLER.

Mr. McLachlan moved for provisional judgment on an unsatisfied debt of £18 8s. 7d.

Provisional judgment granted.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Jacobus Stephanus Gericke, H.son, Jacobus Johannes Pretorius, jun., David Wilhelmus Esterhuyzen, Petrus Johannes Janse van Rensburg, Henry Cooper, Jan Lodewyk van Antwerp, and Christian Albertus Laubser.

GENERAL MOTIONS.

IN RE THE PAARL BANK.

Sir T. Upington moved for the sanction of the Court to the compromise proposed to be effected by the official liquidators with one of their body, Mr. Jacob Isaac de Villiers. Counsel stated that the special report had lain for inspection at the bank as well as the Master's Office.

Mr. Justice Smith: Is there any committee of hareholders?

Sir T. Upington could not say.

The order was granted.

IN RE THE CAPE CENTRAL RAILWAYS.

Mr. Schreiner moved for an order in terms of the second report of the official liquidator. Counsel said that the report had been duly published. On a previous occasion the Court sanctioned the new contract entered into in England, and there now only remained some minor matters to settle. It was suggested that the certificate of the liquidator in England with regard to the holders of debentures should be accepted in the Cape Colony as official, to obviate any duplicating. It was asked that the time for receipt of claims should be fixed, and also the remuneration of the official liquidator. The figures for the year showed a surplus of £5,240 earnings over working expenses, and counsel suggested the payment of £500 to Sir T. Scanlen, the official liquidator, for his year's services.

The Court granted an order in terms of the report, and fixed February 29, 1892, as the latest date for the receipt of claims. Sir T. Scanlen's remuneration was ordered to be £600 for his work up to July 31, 1891.

RESID V. ABADER.

The hearing of this case was resumed. Mr. Schreiner and Mr. Molteno appeared for the plaintiff, and Mr. Searle and Mr. Joubert for the defendant.

The defendant continued his testimony, and explained the various items of account between himself and the plaintiff, whom he denied owing the amount claimed.

By Mr. Schreiner: He was not perfectly acquainted with the affairs of plaintiff. Whenever he collected money for plaintiff he sent it on to Natal the same day. It was quite untrue that plaintiff at any time made an entry in any of witness's books. It was true that when plaintiff was shown the document in dispute he said it was a forgery, and that the signature was not his. Witness had never said that he was a creditor of the plaintiff, instead of being a debtor.

Amina Abader, wife of the defendant, Hadje Magmoet, Sayed Abou Bakar, J. D. Leibbrandt, Gafildien, Samsodien Saban, Kadiga, Abdol Japie, Mustapha, and Hadje Handjah Achmat proceeded to give evidence for the defence as to several of the items of the account between plaintiff and defendant.

SUPREME COURT.

FRIDAY, DECEMBER 11.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

RESID V. ABADER.

Mr. Schreiner and Mr. Molteno represented the plaintiff, and Mr. Searle and Mr. Joubert the defendant.

The evidence having been concluded, Mr. Schreiner proceeded to address the Court and contended that the whole affair was a conspiracy to remove the plaintiff from the Malay priesthood and that the Hadje Magmoet was at the back of it. The plaintiff was a priest of the highest class, whose influence was far-reaching, and there could be no doubt that Magmoet desired to oust him from his position, and compel him to leave the local community.

The Chief Justice said that that was a very easy method of putting it, but where was the evidence to sustain such an accusation?

Mr. Schreiner said that the demeanour of the Hadje in the box went far to prove the justice of the contention. The whole case, he believed, was the outcome of a religious dispute.

Without calling on Mr. Searle,

The Chief Justice gave judgment. His lordship said that the plaintiff must stand or fall upon the question of whether or not the three sums of £25, £60 and £45 were lent by him to the defendant. If he failed upon those items all the other items claimed by him must fall to the ground. The plaintiff must prove that he had lent the money, not by relying upon the weak points of the defendant's case, but upon the strength of his own. All the observations made by counsel for the plaintiff had gone to show that there were weak points in the defendant's case, which was undoubtedly the fact, but counsel had wholly failed to remove the weak points of the plaintiff's own case. The Court was not satisfied that when the plaintiff came into the Colony he possessed all the money he said he had, or that in January, 1890, he was in such circumstances that he could advance to the defendant the money he said he had advanced. The Court was satisfied from Hadje Magmoet's evidence that in January, 1890, the plaintiff asked Magmoet for £50, and that the plaintiff would not have done so had he himself been able to lend money to the defendant. One of the weak points of the plaintiff's case was that whereas it was necessary for him to prove that he paid £71 in full to one Gafildien; as a fact, Gafildien had proved that such never was the case. Another weak point in his case was as to the £100. It was clear that plaintiff was unwilling to leave for Natal unless he first obtained some document as to the position between himself and defendant. The authority to recover the £100 was given to defendant before January 10, 1890, and if that were so, it was an extraordinary circumstance that the item should have been omitted from the receipt for £274. It was not, it was true, a promissory note, but the fact that it had been handed over to defendant for collection would have been a strong reason for its inclusion in the formal receipt. Then there was another extraordinary circumstance. The plaintiff was certainly pressed for money, and letters were continually sent to the defendant, asking him to recover the money to be collected, but nothing whatever was said about profits on the £180 alleged to have been lent by plaintiff to defendant. A great deal had been said about the evidence given by the Imaum Hadje Magmoet. He confessed that his manner of giving evidence did not much impress the Court; there was a pomposity and a sense of his own impor-

tance which did not speak much in favour of a witness, and the man's pride at the fact that he had no need to work, and did not work, was, instead of being creditable to him, as he seemed to imagine, to his discredit. Still, with all these infirmities, he did not think that the manner in which he gave his evidence would justify the Court in thinking that he came there prepared to perjure himself, and the very fact that he admitted telling a polite fib, to escape lending money to a friend, spoke rather in his favour. That witness swore that he was present when the interview took place between plaintiff and defendant, and he produced memoranda which had the appearance of being true. He was corroborated by Abou Bakar, who claimed to be another descendant of the Prophet The Court had to judge between these parties, and he was of opinion that the judgment should be for the defendant with costs. As to the carts, it appeared from the correspondence that if they had not been left with the defendant as security for costs, he would have applied for and obtained such security. The formal judgment would be for the plaintiff for the amount of tender, £81 8s. 2d., with costs to that date, but plaintiff to pay all costs subsequent to the date of tender.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne; Defendant's Attorney, B. M. Brink.]

GENERAL MOTIONS.

PETITION OF CARL HERMAN KOHNE.

Mr. Castens moved for authority to raise a loan on mortgage of certain three lots of ground, situated on the Wynberg Flats, in order that petitioner, a minor duly assisted, may be enabled to pay the purchase price of the said ground, which he has bought from his father.

The Court ordered the application to stand over for information regarding the father's financial position.

PETITION OF THE CAPE OF GOOD HOPE SAVINGS BANK.

Mr. Schreiner moved for revival of the judgment of August 14, 1884, obtained by petitioners against Stephanus Botma on a mortgage bond, and for authority to the Sheriff, who duly attached the property, to proceed with the sale in execution.

The order was granted.

PETITION OF PETRONELLA C. PRINCE.

Mr. Jones moved for a rule *nisi* calling upon petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for judicial separation, custody of the children, and an allowance for maintenance.

The order was granted, the rule to be returnable on the last day of term.

PETITION OF ROBERT J. ZEEMAN.

Mr. Juta moved for an order authorising the Master to take steps towards the appointment of a new trustee to the insolvent estate of Charles Martell, who is now unrepresented, for the purpose of transferring to petitioner certain piece of ground in Buitenkant-street, Cape Town, which is still registered in the insolvent's name.

The order was granted, in so far as the appointment of a new trustee was concerned.

TAYLOR AND SYMONS V. SCHUNKE.

Arbitration — Award — Failure to comply with terms—Contempt of Court—Application for personal attachment.

Mr. Searle moved for an order for personal attachment of the respondent for contempt of this court in respect of his failure to carry out the terms of an award of the arbitrators in the dispute between the parties, which award was made a rule of Court. Counsel stated that the award called upon the respondent to surrender certain farms in the Transkei, which he had failed to do.

Mr. Schreiner appeared for the respondent, and read the affidavit of Mr. Schunke to the effect that he had spent some thousands of pounds on behalf of the applicants, for which he had never been reimbursed. The dispute had arisen in connection with the St. John's River Railway project, and deponent had agreed to withdraw his claim rather than prejudice the undertaking. Arbitration was afterwards resorted to, but the applicants had raised certain difficulties, as the result of which he had been unable to carry out the terms of the award, though he had every desire to do so. There was no desire to contemn the order of the Court. Transfer of several farms had not been made because respondent was not in a position to pay the purchase price and under these circumstances it was impossible for him to comply with the terms of the award

The Chief Justice: Could not the respondent give a full power of attorney to the applicants, authorising them to do everything he can do?

Mr. Schreiner: I don't think there would be the slightest objection to that course on our part.

Mr. Justice Smith: Why should he not cede his rights as security only?

Mr. Schreiner said that if his client were in court he should recommend the adoption of that course.

The Chief Justice ordered the case to stand over, and asked counsel to endeavour to come to an arrangement. The Court, he said, was not fully satisfied that respondent had done all that he could to carry out the rule of Court.

The case accordingly stood over.

PETITION OF BRIDGETT MCEWAN.

Mr. Webber moved for authority to the Master to pay out to petitioner the sum of money awarded to her husband out of the estate of petitioner's father and mother, but paid into the Guardians' Fund on account of his disappearance from the Colony, he having deserted and left destitute his wife and family several years ago.

A rule *nisi* was granted, returnable on January 12, one publication in the *Gazette*.

IN THE ESTATE OF THE LATE PETRUS J. HUGO.

Mr. Schreiner moved for the sanction of the Court to the division of the property in the estate as recommended by the curator.—Mr. Syfret appointed to represent the minor interested therein.

The order was granted.

GEDULD V. GEDULD.

Mr. Tredgold moved to make absolute the rule *nisi* admitting applicant to sue her husband *in forma pauperis* in an action for divorce by reason of his adultery.

The rule was made absolute, Mr. Tredgold to act as counsel.

MCGREGOR'S TRUSTEES V. SILBERBAUER.

Insolvency—Sale of shares—Transfer—Non-registration—Rights of vendee—*Harris* v. *Buissinne's Trustees* (2 Menz., 105) discussed.

Per De Villiers, C J.—*The Court had more than once intimated that although it considered itself bound by that decision,* (Harris v. Buissinne's Trustees) *it would do nothing to extend the principles laid down in that case to other cases unless the Court felt itself compelled by principles of law to do so.*

Mr. Schreiner for the plaintiffs; Mr. Searle for the defendant.

This was a special case, stated for the opinion of the Court, between Mr. George W. Steytler and Mr. Harry Gibson, in their capacity as trustees of the insolvent estate of J. G. McGregor, and Mr. J. C. Silberbauer.

Plaintiffs, when appointed trustees in the estate, discovered that there were registered in the name of the insolvent fifteen shares in the Colonial Mutual Insurance and Trust Company, and 10 shares in the Colonial Fire Insurance Company. These, it appeared, the defendant bought through Messrs. Bolus Bros., brokers, on August 15, 1896, by broker's note, on the ordinary terms of cash against scrip. The price was duly paid by defendant, and the scrip delivered to him on August 18. The insolvent wrote to the companies, desiring them to transfer the shares to Mr. Silberbauer, but as a fact no transfer of the shares was made in the books of either company, although the scrip was in order. The question to be determined was as to whether the shares were an asset in the insolvent's estate, or were the property of the defendant.

The Chief Justice said that registration of immovables stood in the place of delivery of movables, and seeing that the insolvent had also delivered to defendant all his rights in the scrip and duly endorsed the latter, it was difficult to see what more he could do.

Mr. Schreiner remarked that the trust deeds of these companies stated that in all cases of transfer of shares the directors had first to approve of the transferee, which had not been done, in the present instance. Counsel proceeded to argue that the shares had not been fully delivered to the defendant, and were still assets in the estate of the insolvent, and as such were available for liquidation by the trustees.

Counsel referred to the following authorities: *Voet*, 41, 1; *Sande, De Alienatione, Van Leeuwen's Commentaries;* Ordinance 18 of 1846; *Carlis* v. *Oldfield*, 4, H C., 379; *Preston* and *Dixon* v. *Biden's Trustee*, Buch., A.C., 322; *Harris* v. *Buissinne's Trustees*, 2 Menz., 105; *Morkel* v. *Holm*, 2 Juta, 57; *Wright* v. *The Colonial Government*, 1 C.T.L.R., 216.

Without calling on counsel for the defendant,

The Chief Justice gave judgment. The contention on behalf of the plaintiff, his lordship said, amounted to this, that the principle laid down in the case of "Harris and Buissinne's Trustees" ought to be extended to the case of a sale of shares, where the insolvency of the vendor had taken place before registration of the shares in the name of the purchaser. The Court had more than once intimated that, although it considered itself bound by that decision, it would do nothing to extend the principles laid down there to

other cases, unless the Court felt itself compelled by principles of law to do so. The question to be determined in the present case was whether, in the case of a sale of shares when the vendor had done everything that lay in his power to give transfer of the shares, upon his insolvency the purchaser was to take no right as against the trustee. In the case of a sale of immovable property, there was a clear principle enunciated in the case of "Harris and Buissinné's Trustees," and that was that registration of immovables stood in the place of delivery of movables, and inasmuch as in the case of movables there was no transfer of the ownership to the purchaser until there had been delivery, therefore in the case of immovables there was no transfer of the *dominium* in the property until there had been a registration. In the of case a right of action, however, the Court had more than once intimated that when once the cedent, the vendor, had done all in his power to effect a cession of the right of action, the cession was completed. It was only in the recent case of "Wright and the Colonial Government" that the point was fully considered. The principle there laid down, if applied to the present case, ought to be conclusive, and he did not think that the mere fact that the company in which the shares were held required, by its trust deed, that there should be consent to the registration could really affect the present case. No doubt something had still to be done before the assignment was completed, but that was only a provision as between the company and the shareholder, and did not affect the questions either of title or of conveyance. So far as the vendor was concerned, he had done all he could to void his title and conveyance, and the rule of law was that incorporeal property was ceded and conveyed by virtue of the contract by which the vendor had undertaken to do everything in his power to divest himself of his right of action, and where he had done all in his power to that end. He was of opinion that the contention of the plaintiffs could not be sustained, and that judgment must be for the defendant with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

MONDAY, DECEMBER 14.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.) and Mr. Justice BUCHANAN.]

In re THE APPLICATION OF DANIEL JOHANNES THEUNISSEN.

Mr. Graham moved for an order authorizing the Master of the Supreme Court to amend certain letters of administration, bearing date the 25th March, 1891, by describing the applicant in such as Theunissen instead of Theunis.

The Court granted the order.

STRUBEN AND OTHERS V. THE CAPE TOWN DISTRICT WATERWORKS CO., LIMITED.

River — Riparian proprietors — Springs — Streams—Sources—Diversion of water—Reservoir—*Damnum sine injuria*—Interdict—Damages—*Chasemore* v. *Richards* (7 H. L. Ca, 349), and *Grand Junction Canal Co.* v. *Shugar* (L. R., 6 Ch., App. 483) discussed.

Mr. Sohreiner and Mr. Graham appeared for the plaintiffs, and Sir T. Upington, Q.C., and Mr. Juta for the defendant company.

This was an action for a perpetual interdict and for damages. The declaration alleged that the plaintiffs (Messrs Struben, Forrest, Young, Ayres, Reid, J. C. Wrensch, and J. F. J. Wrensch) are the registered owners and proprietors of certain farms and properties situated upon the banks of the Liesbeek River, and as riparian proprietors are entitled to a reasonable share of the water in the said river, including its springs and sources and the streams flowing therefrom into the said river.

That the defendant is the registered proprietor of certain property forming part of the old estate known as Rouw Koop or De Heop, situated upon the left bank of the Liesbeek River, and as such the defendant is an upper riparian proprietor with relation to the plaintiffs in respect of the said river.

Upon the said property of the defendant there rises a constant spring known as the Albion Spring, which is, and has at all times been, a principal spring and source of the said river, upon which a strong and perennial stream was at all times accustomed to flow into and form portion of the stream of the said river.

In or near the bed of the said river, and at a

point in its course above the place where the stream from the aforesaid Albion Spring enters the river, there has at all times been another constant spring known as the Westerford Spring, which was at all times another principal spring and source of the said river, from which a streng and perennial stream was at all times discharged immediately into and formed portion of the stream of the said river.

The defendant in and during the years 1889 and 1890 caused the Albion Spring to be opened up, made excavations at the eye of the said spring to considerable depth, and in those years, and the year 1891, and more especially in and after the months of February and March, 1891, the defendant did and does cause all or nearly all the water of the said Westerford Spring to percolate underground to the said Albion Spring, and did and does cause large quantities of water from the stream of the said river to percolate through the immediate strata into the said Albion Spring so opened up and deepened as aforesaid by the defendant's works.

The defendant in and after the months of February and March, 1891, by means of pumping apparatus established at the said Albion Spring, did and does divert the water of the said spring and the water percolating from the said Westerford Spring, and from the stream of the said river as aforesaid, and does wrongfully and unlawfully convey the water aforesaid away from the said river into a certain reservoir, from which the said water is not again returned by the defendant in any wise to the said river, but is used by the defendant for the purposes of the company. The plaintiffs jointly prayed for a perpetual interdict restraining the defendant

(*a*) From diverting or using more than a reasonable share of the water of the said river, including springs and sources thereof and the streams flowing therefrom into the said river.

(*b*) From conveying any of the water of the said river, including the aforesaid springs, sources, and streams, away from the said river as aforesaid, so that the same is not returned to the said river after use upon defendant's riparian property aforesaid.

(*c*) From interfering or disturbing the springs known as the Albion Spring and the Westerford Spring and sources, and from interrupting or diverting the streams flowing therefrom into the said river, so as to cause the water of the said springs, sources and streams to flow otherwise than it has been accustomed to flow for fifty years and upwards.

The plaintiffs each severally prayed for £100 damages.

The defendant in his plea admitted that he had opened up the Albion Spring, and specially pleaded that

By means of the said opening up excavations and other works in and about the said spring arising as aforesaid on his own land, and which he was entitled to make, he had gained and won from and on his own land an additional and increased supply of water above and beyond the water which had flowed from the said spring into the said river after the defendant had used such quantity thereof as he was legally entitled to use. The said additional and increased supply so arising on his own land had never flowed into the said river, and the defendant had used and diverted it for his own purposes, as he was entitled to do, and that he had never unlawfully diverted or used the water which flowed from the said spring into the said river after his lawful use as aforesaid. Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Upon these pleadings issue was joined.

The Chief Justice, after Mr. Schreiner had opened the case, asked if the issues were not purely questions of law, and if the maxim *damnum sine injuria* did not apply.

Mr. Schreiner contended that the maxim did not apply, and proceeded to draw a distinction between the rights of owners of a private river and those of the public as owners of a public river. Counsel referred to the following authorities: "Hough v. Van der Merwe," Buch. 1874, p. 148; "Acton v. Blundell," 12 M. & W., 858; "Chasemore v. Richards," 7 H. L. Ca. 349; "Angell on Watercourses," p. 161.

The Chief Justice referred to the case of "Grand Junction Canal Company v. Shugar," L.R 6 Ch., 483, in which it was held that, "although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land."

The Chief Justice: As this case is somewhat in your favour, Mr. Schreiner, the Court will hear the evidence.

Mr. Thos. Stewart, M.I.C.E., F.G.S., said he had been in the Colony nine years, and assisted Mr Gamble, late hydraulic engineer of the Colony, during part of that time. He knew the Liesbeek and was familiar with its River and springs and sources. The ostensible rise of the stream was Kirstenbosch Spring; the next important source was the Newlands Spring. Between the two was a spring belonging to Newlands House. The Newlands Spring was divided, one part being joined by the Commetje, and the surplus water would find its way down to the river. The next best source was the Westerford until pumping operations were commenced. He had prepared a descriptive model of the river and certain plans, which he put before the Court. Below the surplus from the Newlands Spring was

the Westerford, which came into the river close to the abutment of the bridge on the left bank of the river. The principal eye of the spring was there. Other water rose in the river at that spot in addition to the main eye of the spring. The water soaked up over an area of 680 square feet besides the main eye. There was no other considerable source between the Westerford and the Albion. The latter was 600 yards, in a straight line, from the Westerford. Below the Albion he knew of no other sources. Previous to the company's operations the Albion was the chief source. The surplus from the Newlands Spring went into the river partly below the Anneberg Brewery and partly near the Josephine Mills. That was the only portion of water coming into the river between the Albion and the Westerford, though there was formerly another small spring. He had made a geological survey of the Peninsula, and found that the original source of the springs was the rain which fell on Table Mountain; part of the water fell through fissures till it reached granite or clay slate, which were impermeable, and caused the water to work out towards the edges. It flowed down to the Liesbeek in many parts by surface channels, but the great proportion in early summer sunk in under the débris on the slopes and gravitated to the hollows, and the actual sinking could be seen in the kloofs and ravines. The water could be seen coming out on the mountain-side. Once the water went down it must find its way to the Liesbeek, according to geological law. The water coming out at the Westerford and the Albion came from the mountain in some such way as he had described. It could not be superficially traced, but he had no doubt it followed an underground channel. The Westerford hitherto had had a fairly constant flow, and was not dry at present. A lowering of the gradient at the Albion would affect the water from the Westerford, the water being drawn from the bed of pervious material which extended from the Albion to the Westerford. The lowering the outlet at the Albion increased the velocity of the flow there, and decreased the supply from the Westerford at certain seasons of the year, but in the winter not even the lower gradient served to draw off the whole of the Westerford Spring. Below the spongy strata through which the water passed between the springs, the strata were comparatively impermeable. The superficial bed of the river between the springs was mostly sand and gravel. The position of the wells showed that the strata varied in water-bearing capacity, but the lowering had certainly induced the water to follow. He had never known the Westerford Spring to be dry before the company's operations were commenced. He had gauged the Westerford outside this dispute altogether. On April 6, 1883, he made sundry gaugings of the spring at places above and below the bridge, and found that the flow was then 221,000 gallons per twenty-four hours, and this was in the dry season before the rainfall. That represented the difference between gauges above and below the bridge, and included water rising from the main eye, and also from the bed of the river. He took the gaugings for the Rondebosch Municipality, and they had no reference to this dispute. He gauged again in May and June, 1883, also for the Municipality, when there had been a considerable rainfall—some six or seven inches. The average was 320,000 to 340,000 gallons per twenty-four hours, the gauges being taken under precisely the same conditions as the previous ones. One gauge gave 372,000 gallons. Since the company commenced operations he had made various gauges, and prepared a table indicating the results.

The Chief Justice: Just put that before the Court, and don't let us take up any more time than we can help.

Mr. Justice Smith: Can you tell us, roughly, what is the flow at the Westerford now?

Witness: No, my lord; the gaugings are for last year. Continuing, witness said he gauged the Albion in June, 1884, for Mr. Gamble, when the quantity was 782,000 gallons per twenty-four hours, that being in the rainy season. No other gaugings were made till the defendant company's excavations had been carried out. The results of the gaugings had been tabulated. The outlet of the Albion was 12½ feet lower than the eye of the Westerford when things were at their normal state. The work at the Albion which drew the water from the Westerford was the sinking of the level; soil removed at the Albion removed support from the Westerford, and diminished its supply.

The Chief Justice: Is the flow from the Albion and the Westerford together, into the river, more or less now than formerly?

Witness: Slightly more at the Albion.

Mr. Justice Smith; Formerly about 1,000,000 gallons ran into the river from both springs. What is the figure now?

Witness said that the flow from the Albion alone was slightly in excess of the previous gaugings for the two, but did not include other water which formerly flowed into the river. All the water at the Albion did not flow into the river; it was diverted when pumping operations went on, and he had known the company work for nine hours and take all the water from the Albion, stopping the supply to the river entirely.

Mr. Justice Smith: Taking the pumping, what is the average flow into the river during each twenty-four hours from the Albien?

Witness said he had no observations showing that, because he did not know the exact times when the company had pumped. Occasionally

they pumped nine or ten hours a day, but the yield, when the pumps were not going, was about 1,100,000 gallons per twenty-four hours.

The Chief Justice: The point is this: Has the defendant's work diminished the water in the river? And that is the only point upon which he seems unable to give us information. Has there or has there not been a diminution of the yield below the Albion, since the defendant commenced working?

Witness said he was not in a position to state.

Mr. Justice Buchanan: None of the plaintiffs are proprietors between the Albion and the Westerford?

Mr. Schreiner: No.

The Chief Justice: Then any of the wells which the company have sunk between the springs, if sunk deep enough, would have the same effect as the deepening of the Albion?

Witness said that would be the case to a limited extent; but he had no doubt, speaking as an expert, that the Westerford had suffered by reason of the deepening of the Albion.

Cross-examined by Sir T. Upington: His theory was based on the fact that the sinking at the Albion had drained the water from the Westerford Spring in the dry season, and also drained some other water which previously found its way to the river. The drainage area that fed the Liesbeek included the whole of Table Mountain from Kirstenbosch to Forrest's Sluice at Rondebosch Bridge. The whole of the water in that area naturally percolated into the Liesbeek. He said that because of the levels and the geological nature of the country. He meant to tell the Court that if a man on the slopes made a well he robbed water from the Liesbeek River. He was prepared to say that except what was taken up by evaporation and vegetation, the rest of the water from the area would reach the Liesbeek. He could not say there was a defined channel on the higher part of the area, but the water fell down in kloofs and channels, and reached the river in various ways. He looked upon the superficial river as more or less the channel for carrying away the water beneath. He could not give an instance, between Kirstenbosch and Forrest's Sluice, where he knew of a defined channel. In the whole of the area the surface formation was a sponge, but the water gravitated towards the Liesbeek. Part of the water of the area would go to the Albion, and part to the Westerford, and the deepening of the Albion drew away water from the Westerford. That need not be the case, however, all over the Peninsula; it would depend on whether the strata were impermeable. He thought that the water from the Westerford passed partly under the wells and partly over, as the levels showed. Before he had anything to do with the present case, he sank a pit near the Westerford Spring, but at no other spot, and had made no practical examination below the bed of any well to see if water percolated or not. The Newlands Spring was much higher than the Westerford. From the outlet of the Newlands Spring to the eye of the Westerford was about 980 yards, but the country there was variable, and there were possibly impermeable strata intervening. That was the only way in which he could account for the Newlands Spring not being drained; as a fact, he did not know if it had been drained or not. He had gauged the water in the Liesbeek below the Albion since the company's operations had been commenced, but took no gaugings before the alterations were made, for the reason that he was not then employed. He considered that the lowering of the Albion had led to the decrease of the supply to the river at that spot, but was not prepared to say that the volume of water below the outlet from the Albion had been decreased, because he took no observations before. Upon certain days pumping operations had gone on for nine hours when no water went into the river. There were not very many of such days. He had seen the Westerford Spring dry in April, 1891. He saw the spring on Sunday, when there was a fair flow, but smaller than he had known it previously. Gaugings taken by him in May and June, 1889, varied from 182,000 gallons on May 17 to 872,000 gallons on June 8. He did not account for that; he simply stated it as a fact. He believed that that was before the company commenced operations.

Mr. Justice Smith: Why didn't you gauge it on Saturday, so that we might know what is the flow now?

Witness said he had not been instructed to that end.

Cross-examination continued: The eye of the spring was a foot or two from the water in the river bed. He could make no traceable connection between the Albion and the Westerford, but surrounding circumstances told that there was such a connection.

Re-examined: On one occasion he dug a pit for the Rondebosch Municipality, but nothing he did then affected the permanent flow of the Westerford Spring. There was a ravine near the Newlands Spring, and the formation there was boulders and clay. On the 28th of January last, the culvert from the Albion to the river was perfectly dry some hours, showing that the company's operations had caused all the water from the spring to be absorbed.

Mr. J. H. Gibbs, engineer, stated that he had assisted Mr. Stewart in preparing the diagrams of gaugings, and that they were correct. On many occasions he had seen the culvert from the Albion to the river perfectly dry, showing that all the yield of the spring had been absorbed. One date

was 27th February last, and there were fully half a dozen such occasions. He examined the culvert every half-hour. He had observed water leaving the river whilst the pumps were going at the Albion Spring. He had seen the water of the river decrease in volume on several occasions, and had found the reason to be that water from the river had been absorbed by the eye of the Westerford Spring. From March to April of the present year the Westerford Spring flowed rarely.

The Chief Justice: Did you take any observations before the company commenced operations?

Witness: No, my lord.

The Chief Justice: That is the principal thing we want to know.

Mr. E. J. Witney, furniture dealer, said he had known the Westerford Spring thirty-two years, and had not known it fail until the defendants commenced operations.

By Sir T. Upington: In old times the Westerford Bridge Spring was of no account, and he did not believe it was much better to-day. He had seen the spring six times within the last month, and considered the stream as strong as ever it was. He considered that the company had very greatly improved the Albion Spring; it was much stronger, cleaner, and purer.

By the Chief Justice: Since the defendants constructed their works he believed that the yield of water to the river was much greater.

Mr. Frederick J. Coetzee, a retired farmer, who said he had lived in the Mowbray district sixty years, gave evidence that in 1880 there were many old sluices on the river, and that in those days the Westerford Spring ran well all the year through.

The further hearing of the case was adjourned *sine die*.

SUPREME COURT.

TUESDAY, DECEMBER, 15.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

COLONIAL ORPHAN CHAMBER V. MARNITZ.

Trespass — Action — Damages — Tender — Costs.

Mr. Schreiner and Mr. Molteno for the plaintiffs; Sir T. Upington Q.C., and Mr. Searle for defendant.

This was an action instituted by the Colonial Orphan Chamber against Mr. Philip Marnitz, of Uniondale. The plaintiffs claimed damages for trespass on a certain property belonging to them, as the registered owners of a certain portion of the farm Rietvlei, in Uniondale, of which the defendant was owner of the remaining extent. The properties had a common boundary, and the plaintiffs claimed £200 for an alleged trespass on their land. A rule *nisi* was granted by the Court in connection with the case in March last, pending a settlement of the question, which was really one of title. The damage caused to plaintiffs, counsel stated, was no doubt considerable, but the question of damages would hinge upon that of title. To the declaration defendant pleaded a denial of the trespass, and also that, as the registered owner of portion of the farm Rietvlei, he was fully entitled to use the land in dispute on the date of the alleged trespass. He denied that the plaintiffs had sustained damage, and in reconvention claimed that in 1889 and 1890 plaintiffs trespassed on his land, for which he claimed £300 damages. Defendant further claimed that he was the true owner of a certain marsh or vlei, situated on the said farm, and described in the title deed as common to both portions of the farm. Defendant also claimed a perpetual interdict and a declaration of rights as to the ownership of the marsh. Practically the dispute was as to the ownership of the marsh. Plaintiffs admitted a nominal trespass on defendant's land, and offered £80 as compensation.

Mr. D. F. Morkel, Government surveyor, gave evidence as to the situation of the marsh, and stated that defendant appeared to have ploughed up the land and sown it with beans. According to the diagram of the plaintiffs, the marsh was included in their property.

Mr. Lucas Maree, who said he had lived in the Uniondale district fifty-four years, deposed that he knew the farm Rietvlei before the village was laid out in 1855. He remembered the marsh long before 1846, when Zondagh and Dannhauser obtained title of portion of the farm From that time onwards the people on the north side of the river occupied the marsh right up to its edge, and no other persons ploughed or used it. So far as he knew, Zondagh and Dannhauser claimed the marsh from the time they obtained title from De Jaager. The portion they did not work themselves they let out on tribute. Two years' working of the land defendant held would not be so valuable as one year's of the land he was alleged to have trespassed on. The defendant's land which plaintiffs were alleged to have trespassed on was not very fruitful.

By Sir T. Upington: His homestead was nine miles from the place in dispute, but he was frequently on the spot.

By the Court: He did not know if Zondagh and Dannhaüser occupied the marsh by arrangement with other landed proprietors interested.

Mr. J. Wemeyer, formerly member for George, stated that he was interested in the laying out of the village of Uniondale. He acted for a Mr. Van Rooi in a dispute which arose between him and Zondagh and Dannhaüser, in 1854, for an alleged impounding of Van Rooi's cattle. He advised the latter to bring an action, but when he had examined Zondagh and Dannhaüser's title to the marsh, recommended his client not to prosecute his action. Van Rooi then gave up claim to the marsh, which was cultivated by Zondagh and Dannhaüser continuously. In Dannhaüser's time the boundary was a ditch, and cattle which went beyond that were impounded.

Mr. Cornelius Maree, a farmer living in the Uniondale district since 1872, deposed that at the time he knew it the marsh was only used and cultivated by Zondagh and Dannhaüser, predecessors of plaintiffs.

The Registrar of Deeds stated that in the Deeds Office a document of transfer, which simply stated with regard to a marsh running between two properties that the marsh was common to both, would not be passed.

By the Court: He had never had such a case as this to deal with, but he considered that if a marsh was to be conveyed as such it would require separate transfer and diagram.

Mr. Henry Stewart gave evidence that his brother was once owner of the farm Rietvlei. Zondagh and Dannhaüser always used the marsh as their own.

Mr. E. Stewart, lessee of a part of the farm from the Orphan Chamber, said that the occupation by defendant of the land in dispute had caused damage to the extent of fully £100 as regarded the first crops alone, whilst there had been no chance of sowing second crops owing to the trespass.

For the defence,

Mr. Philip Marnitz, the defendant, testified that he first occupied the marsh in January last. He asserted his right to the land, including one-half of the vlei, in which he believed he had a common right. The land for trespassing upon which plaintiffs offered him £30 was very valuable land, and the money offered did not represent the loss he had sustained.

Mr. Schreiner having addressed the Court for the plaintiffs,

The Chief Justice, without calling on counsel for the defendant, gave judgment. It was very satisfactory, he said, to hear from the Registrar of Deeds that transfer would not at present be allowed in the form in which it had been allowed in the present case, but in point of fact the transfer had been effected, and the Court must, with the materials at its disposal, attempt to give a true definition and meaning to that transfer. Let them first of all take the case as it would have been between the former transferor, De Jaager, and the transferee, Oelofse. If the case had arisen between those persons there would have been no doubt that the transferee would have been entitled to the land up to the middle of the marsh. As to the marsh itself, it was not by any means of such a vague and undefined nature as was contended for on behalf of the plaintiffs, because, looking to the original diagram, it was marked down as a clear and specific place. On the original diagram the Klein River and the Riet River were marked down both as flowing into a marsh called the Valentine Marsh. Upon the diagram attached to the transfer the same features appeared, and a compilation put in showed that there was also a marsh in the Klein River, and that that wide river was really not a river at all, but a marsh; but that was only a compilation, for which there was no authority in the original grant, or in the diagram attached to the transfer to Oelofse. Now, the words of the conveyance were: "bounded north and east by the marsh or valley B C D E F G." If it had stopped there, possibly there might have been some doubt, but in view of the fact that the marsh was really in point of fact a portion of the river and a continuation of the Klein and the Riet Rivers, he thought little difficulty would have arisen then, because the original rule of construction might have applied, that where a river was a boundary it meant up to the middle of the river. Of course it was said that there they had to do with a marsh, but he had already shown that the so-called marsh was really an intervening space between the Riet and Klein Rivers on one side, and the Kannasse River on the other. But then the conveyance went on as if to remove all doubt as to the boundary, "which is common to the proprietors of both portions of Rietvlei." The effect of that was to make it appear almost as if the marsh was a common wall to the two properties, though he confessed that the word "common" used there was rather a misnomer. Then it went on: "Separating the two portions of Rietvlei." If, as that pointed out, the marsh separated the two then it could only be a middle line, which could fairly be considered as the boundary between the two portions. He had no doubt that would have been the construction which any court of law would have given if a case had arisen between De Jaager, as transferor, and Oelofse as transferee. Now they came to the rights of the plaintiff, who was the successor of the transferror, and those of the defendant, the successor of the transferee. The transferor could not cede greater rights to the plaintiff's predecessor than he had himself. If he had already conveyed land up to

the middle of the marsh on the one side, he could only convey up to the middle on the other side. There was certainly the strong argument raised by Mr. Schreiner that it was unfair towards a transferee if he had not got a diagram which clearly showed his boundary, but still the fact that a mistake had been made in a diagram could not affect the justice of the case. The original transferee had got his rights to the middle of this marsh, and could not be deprived of those rights, and the present case had to be decided between the successors of the transferor and the transferee. If the defendant now had the share which Oelofse had then, in his opinion, according to the well-known rule of construction, his rights extended to a line drawn through the middle of the marsh. It was not a case in which there was a conflict between the body of a transfer deed and the diagram, because the latter made it clear that the land was to be common, and there was the important circumstance which made it almost conclusive that a memo. was attached, stating that the extent of common marsh was limited by the line A B. He was of opinion, in order to give the true construction and meaning to the transfer, that the Court was bound to hold that the intention of the parties was to transfer the land to a line drawn through the middle of the marsh. It was clear, therefore, that there had been no trespass on the part of the defendant. The plaintiffs admitted trespassing on a portion of land which undoubtedly belonged to defendant, and tendered £30 for the trespass, but the defendant in his counter-claim asked the Court to make a declaration of rights which he for his part was not prepared to make at all. Upon the claim in convention the plaintiffs must fail, and there would be absolution from the instance with costs. Upon the claim in reconvention there would be judgment for the plaintiff (defendant in the claim in convention) for £30, also with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

WEDNESDAY, DECEMBER 16.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

OHLSSON'S CAPE BREWERIES, LIMITED v. WHITEHEAD.

Trespass— Private road— Damages— Interdict.

Sir T. Upington, Q.C., and Mr. Juta appeared for the plaintiff company, and Mr. Schreiner and Mr. Sheil for the defendant.

This was an action for £100 damages for trespass and for a perpetual interdict.

The declaration alleged that the defendant was the registered owner of lots 4, 7, 8, 11, and 12 of the sub-divided estate Palmboom, in Newlands, which lots were sold in 1851. By the diagram attached to defendant's title lot No. 4 is bounded to the north by lot No. 3 of the said sub-divided estate, to the south by a cross-road, to the east by lot No. 7, and to the west by a cross-road. That the plaintiff company was the registered owner of lots 1, 2, and 3 of the said sub-divided estate, also sold in 1851, and was also the registered owner of certain property known as the Newlands Brewery, situated to the west of lots 1 and 3, by which it is bounded.

That the said cross-road bounding the defendant's lot 4 on the west was, and is, a road up to a spot where the said lot No. 4 is bounded by lot No. 3, and where the lot No. 3 is bounded by the said brewery property, and is of a certain width.

That the defendant claimed that the said road should continue of the same width, and beyond the said spot, for the entire length of the said lots 1 and 3, and that he was entitled to use the land of that width and length as a road, and that the plaintiff company denied the said claim of the defendant.

That the plaintiff company in or about the month of November, 1891, erected a fence along the boundary of the said Newlands Brewery property and across the piece of land claimed as aforesaid by the defendant as a road, but of which the plaintiff company was the registered owner and that the defendant, by himself, his servants, and agents, in the said month, violently, wrongfully, and unlawfully trespassed upon the said piece of land belonging to the plaintiff as aforesaid and broke down and removed the said fence, by

reason whereof the plaintiff company suffered damage to the extent of £100. The plaintiff company claimed:

(*a*) £100 as damages.

(*b*) A declaration that the defendant was not entitled to come upon the said piece of land of the width and length aforesaid, or to use it as a road.

(*c*) A perpetual interdict restraining the defendant from trespassing upon the said piece of land.

(*d*) General relief.

In the alternative the plaintiff company claimed that they and their predecessors in title had uninterruptedly, and as of right, used and occupied the said piece of land, of the width and length aforesaid, for a period longer than the period of prescription, and from the year 1851.

The defendant in his plea admitted that he broke down and removed the fence referred to in the declaration, in consequence, as he alleged, of the plaintiffs having wrongfully and unlawfully erected the said fence in violation of defendants' right to use the said road, which was wrongfully and unlawfully obstructed by the said fence. He further specially pleaded that the road obstructed was not owned by the plaintiff company as proprietors of either lots 1, 2, and 3, or of the Newlands Brewery property, and that he (the defendant) was entitled to the use of the said road by virtue of the conditions of his tenure of lots 4, 7, 8, 11, and 12, shown upon the original plan framed on the 10th January, 1851, which shows the roads referred to in the declaration as roads common to the lots there sold and disposed of. Wherefore defendant prayed that plaintiffs' claim should be dismissed with costs.

Upon these pleadings issue was joined.

Mr. A. Ohlsson, M.L.A., managing director of the plaintiff company, said he knew the place in dispute very well, and there was not the faintest indication of a road there. The place was covered with trees, and in the winter was so marshy that it was impassable. Defendant had never claimed a right of road, but on one occasion he came on to the land whereupon witness sent his brewer to tell defendant that if he did so again he would be prosecuted for trespass. If defendant obtained the use of the land in dispute he would gain nothing in distance, nor could he get out anywhere.

By Mr. Schreiner: He purchased the Anneberg property ten years ago, but knew it before then. He claimed that his title deed gave him the right to this land, and if that contention failed he said it was his by prescription. He had already enclosed the land on one occasion, but the fence had probably been pulled down. People occasionally pulled down his fences even now, but he only desired to enclose property which was his. He distinctly said that for ten years the land in dispute had not been used as a footpath or road. Whenever he had seen anyone on the land he turned him back. He admitted that so far as Dean-street was concerned defendant would gain if the land in dispute were opened up as a road. He had placed boards up warning trespassers off the land, but did not know that defendant had pulled them down.

Re-examined: There was not the slightest indication of communication between defendant's house and Dean-street.

By the Court: Before witness came into possession the alleged road was occupied as part of the Anneberg property, and he claimed it by virtue of the ownership of Anneberg.

Mr. J. C. Neser, vendor of the property now owned by defendant, gave evidence that he knew the alleged road claimed by defendant, and although he had lived in the district since 1844 he never saw a road at that spot. He never used the land as a road when he held the property. Two sluits ran across it, and the place would be useless for the purposes of a road.

By Mr. Schreiner: He had never seen carts go along the alleged road. The owner who preceded plaintiffs several times set up a spar at the spot, but it was always removed.

By the Court: In Cloete's time, before the plaintiffs came into possession, witness regarded the land as a piece of road never used, but Cloete on several occasions stopped him from going that way, and said there was no road there.

Mr. D. Ireland, miller, said that in 1868 he entered into possession of the land where the Anneberg Brewery was afterwards built. Up to 1873 he cultivated a garden where the alleged road was. In his time there was no footpath along the alleged road.

By Mr. Schreiner: During witness's occupation defendant was in his employ. People might have passed over the land occasionally in his time, but to no great extent.

Mr. T. Willey, timber merchant, gave evidence that in 1860 he occupied the property now owned by defendant, and never knew the alleged road to be used as a road.

By Mr. Schreiner: He only lived there three years.

Charles Cloete, son of the coachman to the late Mr. R. Cloete, said he had lived forty-five years at Newlands, and had never known the land in dispute to be used as a road.

Mr. R. Walton, engineer, deposed that he was supervising the construction of a fence on behalf of the company, when defendant and his sons interfered, and refused to allow the work to go on.

Mr. J. J. Bisset, Government surveyor, deposed that he had examined the land in dispute, upon which there was no defined footpath.

By Mr. Schreiner: There was an irregular track, but nothing like a footpath.

For the defence,

Mr. R. E. Whitehead, the defendant, testified that there were three houses on his property, all occupied. If the land in dispute were closed up, it would be to the great detriment of his property. He had always used the land as a footpath, without hindrance on anyone's part. Whenever an attempt was made to close the road he broke down the fence, and he had also removed a board put up by Mr. Ohlsson warning off trespassers from the road. During the whole time Ireland was on the land people used the road largely, and the track was clearly defined.

Cross-examined: He used the road in dispute to get to Rondebosch and Mowbray. His short-cut took him close to the brewery wall. In regard to the alleged road, it was practically a case of every one making his own footpath. There was one distinct footpath, and several tracks.

By the Chief Justice: He claimed the road as a public road, not as a servitude by his property on the plaintiffs' property. He considered that if plaintiffs were allowed to enclose the land his property would suffer to the extent of quite £200. He was fighting the case because he felt that an attempt was being made by a rich man to obtain an advantage over a poor one.

The Chief Justice: It is no question of rich against poor. If the road is yours you will get it.

Mr. C. S. Powrie, ex-Mayor of Claremont, stated that he had seen an irregular path along the course of the alleged road, running in and out among the trees.

Mr. A. Manson, a former member of the Claremont Municipality, said he had used the footpath from a boy.

Similar evidence was given by Mr. George Whitehead, a son of defendant; Mr. T. Dreyer, who was formerly employed at Cloete's Brewery; Mr. Philip J. Scott, undertaker, of Newlands; and Doate Kannemeyer, labourer.

The further hearing was adjourned *sine die*.

SUPREME COURT.

THURSDAY, DECEMBER 17.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr Justice BUCHANAN.]

PROVISIONAL ROLL.

UNION BANK V. UYS.

Mr. Schreiner moved for final adjudication of the defendant's estate, the provisional order having been granted on December 7.

The order was granted.

REHABILITATION.

The Court granted the rehabilitation of Casper Jacobus Albertus van Zyl.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF THE LATE JOHN WOLSTENHOLME.

Mr. Shiel moved, on the petition of Mr. S. van Niekerk, trustee of the said estate, for the acceptance of his resignation of the office on the grounds of his intended departure from the Colony, and that an asset of doubtful value only remained to be realised.

The Chief Justice: What are the remaining assets?

Mr. Shiel: A farm and some unimportant erven, to which there appears to be no title, my lord.

The Court granted a rule *nisi* calling upon all persons concerned to show cause why the application should not be granted, the rule returnable on January 12, and to be made absolute in the absence of valid objection; one publication in the *Gazette*.

PETITION OF MYRA HARVEY.

Mr. Castens moved for a rule *nisi* requiring petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his adultery.

The rule was granted, and made returnable on January 12.

PETITION OF AMY THOMAS.

Mr. McLachlan moved for leave to sue *in forma pauperis* by edictal citation, in an action for divorce against petitioner's husband, a gunner in the Royal Artillery, now stationed in England.

The rule was granted, and made returnable on the last day of next term; personal service to be effected.

VAN RENEN'S TRUSTEES V. VERSFELD AND OTHERS.

Mr. Schreiner moved for the issue of a commission to take the evidence, on behalf of the defendants, of Mrs. Rivers, a witness residing at Brighton, England.

Mr. Searle appeared for the plaintiffs in the case, and consented to the application.

The order was granted.

PETITION OF LOUIS A. VINTCENT.

Mr. Schreiner moved for leave of absence, on the ground of petitioner's state of health being such that he will be unable to continue to attend to his duties, as one of the official liquidators of the Cape of Good Hope Bank; such leave of absence to be for four months from December 30, 1892.

The order was granted.

PETITION OF WILHELMINA S. M. ODENDAAL.

Mr. Watermeyer moved for leave to sue *in forma pauperis* in an action for divorce against petitioner's husband by reason of his adultery.

The matter was referred to counsel for his certificate.

PETITION OF JOHANNES J. GEYER.

Mr. Webber moved for authority to raise a loan to satisfy the balance of purchase price and expenses arising from the investment, in landed property, of certain trust funds in the petitioner's hands by virtue of the ante-nuptial contract of Pieter A. Welkin and Aletta P. Geyer.

The Chief Justice asked why the Court should interfere at all if the trustee had the power to act under the contract.

The application was ordered to stand over for further inquiry.

PETITION OF ELIAS MARK.

Mr. Juta moved for leave to sue *in forma pauperis* in an action against Selomon Koskie for restoration of certain gold and silver articles deposited with him by way of pledge.

The matter was referred to counsel for his certificate.

PETITION OF MARY A. L. TADMAN.

Mr. Schreiner moved for leave to sue by edictal citation in an action against petitioner's husband, Chas. A. Tadman, who left petitioner in 1884, and is believed to be resident in England. Counsel stated that the application arose out of the recent case of "Hatch v. Hatch." The petitioner had now heard from Tadman's sister that he had been seen in London, but there was no evidence as to his precise whereabouts. Tadman appeared to be in not very flourishing circumstances, and probably did not wish his address to be known.

The order was granted, personal service if possible, failing which one publication in the *Daily Telegraph*; the rule to be returnable on the last day of next term.

PETITION OF MARGARET MUDIE.

Mr. Schreiner moved for leave to sue *in forma pauperis* in an action against petitioner's husband, John Mudie, for a judicial separation by reason of his cruelty.

The matter was referred to counsel for his certificate.

PETITION OF OLAFF LARS NELSON.

Mr. Giddy moved for leave to raise a loan for the purpose of paying the balance of purchase price and expenses on certain piece of landed property at Retreat, bought by petitioner in trust for his minor daughter.

The Chief Justice said these applications were becoming too numerous. If the man wished to buy the property why did he not do so?

Mr. Giddy said he had not the ready money at present, and did not wish to take the money out of his business.

Mr. Justice Smith: What does he want to raise?

Mr. Giddy: £50.

Mr. Justice Smith: Surely he should raise it out of his business funds.

The Chief Justice said that if the land was to be a present to the child petitioner should wait till he had the money.

Mr. Justice Buchanan said the principle of the application was not to be encouraged.

The Court held that there was not sufficient information before it to justify the granting of the application.

In re THE ASSIGNMENT OF SIR THOMAS SCANLEN'S ESTATE.

Assignment for benefit of creditors.

Mr. Schreiner moved for the sanction of the Court to the proposed acceptance by the official liquidators of the assignment of the estate of Sir Thomas C. Scanlen, a debtor to the bank.

The Chief Justice asked if the liquidators of the Cape of Good Hope Bank agreed.

Mr. Schreiner said yes, but there was some objection on the part of certain creditors of the Union Bank. Counsel proceeded to state that he moved on notice to the attorneys for the objectors, and that the petition of the liquidators of the Union Bank set forth that Sir Thomas Scanlen was a debtor to the bank in the sum of over £87,000, and had proposed an assignment of his estate, subject to the Court's approval. Notice had been published in the *Gazette*, and the deed of assignment was in accordance with the notice. The liquidators were of opinion that the assignment was for the benefit of the liquidation, and no

opposing affidavit had been filed. The agreement effected an out-and-out assignment of the estate, and he might state that when the Court recently ordered Sir Thomas Scanlen £600 in the liquidation of the Cape Central Railways he at once handed over his share to the liquidators. The assignees were two of the liquidators of the Union Bank and two of the Cape of Good Hope Bank, and under the peculiar circumstances of the case these gentlemen had agreed to charge no fees, which would mean a substantial benefit to the estate. The deficiency as per schedules was £42,000, and it was impossible for the debtor, at his time of life, to right himself with that burden of debt round his neck.

The Chief Justice asked if the terms were more favourable to the liquidation than the proposed arrangement which the Court refused to sanction recently.

Mr. Schreiner said he could not answer that better than by saying that the assignment was complete. There was no fixed figure named now, and the whole of the estate would be distributed. The assignment was as complete as if insolvency had taken place. All the life policies were included, although, if strict law were enforced, at least one would be kept for the benefit of the wife and family; even the household furniture was given up, and not a single stick left out. The letter of objection was signed by ten contributories, and set forth that they protested against the debtor's release, seeing that he had had the use of a sum larger than the entire capital of the bank, and that the objectors might be called on to pay further calls. With regard to that letter all he (counsel) could say was that Sir Thomas Scanlen proposed to do more than could be done if insolvency were resorted to.

Mr. Justice Buchanan: It is simply a question of assignment or insolvency?

Mr. Schreiner: That is it.

Mr. Justice Buchanan: He is not a shareholder?

Mr. Schreiner: No, a debtor, and insolvency can only result in loss and expense to the creditors.

The Chief Justice: You see, it is not quite correct to say that there is no difference between insolvency and assignment, because in insolvency there would be some years in which creditors could claim.

Mr. Schreiner said he did not wish to argue the case because it was eminently for the Court's own discretion, but he suggested that the liquidators were aware of what seemed best in the interests of all concerned.

The Chief Justice said that if the liquidators had not previously made a proposal, which the Court could not possibly accept, it might have been different, but as it was, a proposal was made recently of such a nature as to take the force from counsel's remark that the liquidators proposed the present arrangement.

Mr. Schreiner said that in the previous case the Court said the arrangement might be for the benefit of the Standard Bank. On that occasion the Court took the view that the Standard Bank would have got some profit.

The Chief Justice: Undoubtedly it would have done so. It would have got the lion's share of the estate.

Mr. Schreiner: Would the Court, because of that perhaps short-sighted recommendation, now object to a full and complete assignment?

The Chief Justice: It is only in reference to your remark that the liquidators know what is best. In that case the Court knew far better than the liquidators what was best.

Mr. Schreiner said the liquidators only proposed to follow the course taken in very many other cases, the Court having granted many similar applications where there was proof of a *bona-fide* assignment. He did not see why Sir T. Scanlen should be dealt with in a special way, seeing that there were no special circumstances in his case.

The Chief Justice said that most of those cases had been those of unfortunate shareholders, whereas the present case was that of a person who had been heavily involved as a debtor.

Mr. Schreiner said that many of the cases he referred to were those of debtors.

The Chief Justice said the only point was whether the arrangement was for the benefit of the creditors.

Mr. Juta, who appeared for the objectors, said he was instructed on behalf of gentlemen who had paid calls of very nearly £100,000, and he would therefore submit that they had a very interested voice in this matter. The first thing he had to point out was that under the proposed assignment the only persons who were really interested were the shareholders of the Union Bank, because the promissory notes held by the Standard Bank and the Cape of Good Hope Bank were backed and secured by good names, and would be met, so that each of those institutions would get its 20s. in the £. In the case of the Union Bank, the only asset the liquidators had to fall back on was the insolvent estate of W. A. Lippert & Co., and that meant that the share holders would not benefit much by this assignment. There was no wish, on the part of those for whom he was speaking, to force Sir Thos. Scanlen into the Insolvency, but the objectors did not see why Sir Thomas should be released for ever. They said that any surplus money they had, over and above what was necessary for bare existence, was liable to be taken for calls, and they did not see why this debtor should be allowed to keep the surplus in his case.

The Chief Justice: Supposing Sir Thomas Scanlen sent in his petition for the surrender of his estate, would not the Court accept it?

Mr. Juta: I suppose it would.

The Chief Justice: And that result will probably follow if this application is refused, and if there were a surrender I am satisfied that the liquidators would get less than under the arrangement now proposed.

Mr. Justice Buchanan said that what struck him was that the shareholders would be considerable losers if insolvency were forced.

Mr. Juta suggested that the debtor should offer some arrangement by which his earnings for some two or three years ahead should go into the assignment funds. He quite saw the force of the views put forward on the other side, but here were nearly a dozen business men for whom he was instructed, and he felt that if they did not know what was best in their own interests he could not lay claim to that knowledge.

The Chief Justice: The fact that a somewhat satisfactory arrangement could now be entered into between the liquidators of the Union Bank and Sir Thomas Scanlen showed how necessary it was for the Court to refuse the previous application, because he was quite satisfied that under the present arrangement the shareholders of the Union Bank would be much more benefited than under the previous one. Still, the objection came from shareholders, and it had been urged by Mr. Juta that they ought to know best whether it was to their interest that this agreement should be accepted or not. He could not help saying that there must be some feeling of soreness on the part of those who were under this great liability to contribute towards the debt of the bank, that they should be continually called on to pay the debts while one of the debtors should be released, and this feeling of soreness had probably had some influence on these gentlemen in the opinion which they had formed of the case. The Court must look at the matter from an entirely impartial point of view, and mainly from the point of view of what was for the interest of the shareholders and the creditors, and looking at it from that standpoint, he was satisfied that it was for their benefit that the present arrangement should be accepted. If it were not accepted he was satisfied that the estate would be forced into insolvency, which would mean heavy commissions and expenses, whilst the estate would not realise as much as under the present assignment. Under all the circumstances, therefore, the Court was of opinion that the proposed assignment should be sanctioned as prayed.

Their lordships concurred.

THE PETITION OF B. REINHARD.

Mr. Giddy moved for authority to raise a loan of £125 on mortgage, for the repair of property in the occupation of petitioner. From the statement of counsel it appeared that petitioner was left certain houses in Cape Town by will, on condition that he kept them in a state of proper repair. Petitioner was an old man, in a very feeble state of health. He was very poor, having insufficient to live on, and could not therefore repair the property, which the Town Council had called on him to do without delay. The heirs into whose possession the property would come at petitioner's death had been applied to, but had refused to come to his assistance. Counsel admitted that the terms of the will were clear, but submitted that under the special circumstances the Court would be justified in interfering.

The Chief Justice said that these hard cases made bad law, and the Court could not set the provisions of the will aside.

The prayer was therefore refused.

IN RE THE CAPE STOCK-FARMING COMPANY.

Mr. Schreiner mentioned that in this matter he appeared for Mr. Vardy, who had filed certain affidavits, and now asked that the Court would fix a date by which the respondents should be called on to file answering affidavits. He mentioned January 12, if that would suit the Court.

The Chief Justice said that date would serve, since he was sure the Court would not be ready to hear the case before that time.

DU TOIT V. LOUW.

Mr. Searle and Mr. Tredgold for plaintiff; Mr Juta and Mr. McLachlan for defendant.

This was an action brought by Mr Jacobus J. du Toit, of Fraserburg, against Mr. Jacobus J. Louw, of Beaufort West, to recover £396. The matter originally came before the Court as a provisional case, but the parties agreed to its trial as an action. Defendant signed two promissory notes, one for £400 and the other for £300, in favour of plaintiff, payable two months and four months after date respectively. Subsequently £300 was paid, and plaintiff admitted owing defendant £4 in respect of a transaction in vinegar. He now claimed the remaining £396. The plea admitted the formal facts, but stated that £286 17s. was all that was owing, and that defendant tendered.

Evidence was given as to the items of account in dispute.

After argument,

The Chief Justice gave judgment. He said that counsel for the plaintiff having abandoned several items, all that the Court had to give judgment on were those of £10, the difference on the exchange

transaction, and £90, the price of the spider. As to the first, the Court was inclined to accept the version of the plaintiff, and with regard to the spider it appeared from the books that there was clearly a sale, and the plaintiff was to be believed on that point also. Judgment would be for plaintiff for £886 17s. on the promissory note, with costs from the date of summons.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. van Zyl & Buissinne.]

JOUBERT V. THOMSON.

Seduction—Action—Damages—Maintenance.

Mr. Juta for plaintiff; Sir T. Upington, Q.C., for defendant.

This was an action for damages for seduction. The parties reside at Britstown, and were each about twenty years old. The plaintiff, the daughter of a widow residing in the village, alleged that defendant, who assisted his father in the management of a store, seduced her under a promise of marriage, and that in July last she gave birth to a child, of which he was the father. She claimed £500 as damages for the alleged seduction.

Defendant admitted the seduction, but denied that it was under the promise of marriage. His counsel stated that an offer of £120, with costs to date of tender, had been made, but plaintiff had refused to accept it.

Mr. Juta said that with regard to the tender, it was not made to the solicitor on the record, but locally, and so was not accepted. He was willing to take £100 and costs.

Sir T. Upington said that the costs would amount to £150, which his client was unable to pay.

Mr. Juta said that from what his learned friend said it appeared that an attempt would be made by defendant to escape the judgment, and as that was so he preferred to fight the case out, in the hope of securing alimony from defendant.

A. C. Thomson, the defendant, in reply to Sir T. Upington, stated that he assisted his father in a store, and received £50 per year salary, with board and lodging. He had no property.

By Mr. Juta: He was not in the habit of speculating in sheep. He once sold some hundreds of sheep through a Mr. Duggan. They were in his name, but belonged to his father. Pressed further, the witness at first said that the sheep were his father's, and then kept silence when asked why they were not sold in his father's name. He had been on a trading trip to Upington, but the profits were not his. He had assisted his father five years, and received the same salary now as when he began. His mother died lately, and he had been told he was an heir under the will.

The Chief Justice said the tender of £120 was insufficient, and gave judgment for the plaintiff for £100 with costs, and also for a maintenance charge of £1 per month until the child reached the age of sixteen years, payment to date from the birth of the child, and to be made on the first day of each month.

[Plaintiff's Attorneys, Messrs. van Zyl & Buissinne; Defendant's Attorney, Paul de Villiers.]

SUPREME COURT.

FRIDAY, DECEMBER 18.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. VISSER.

Act 27 of 1882, section 10—Contravention—Conviction—Special Justice of the Peace—Review.

The Chief Justice said the Court had considered this case which was tried before the Special J.P. of Laingsburg. The prisoner was charged with contravening Act 27 of 1882, section 10, and pledged not guilty. The justice found him guilty on three counts, whereas there was only one, and he was sentenced as for three separate offences, the result being that the man was sentenced to three terms of imprisonment of the total period of three months. He was not prepared to say that a special J.P. could not for distinct offences sentence a man to three months' imprisonment, when each offence was separately proved and treated; but in the present case there was only one count, and the J.P. having treated the case in that way the Court would reduce the sentence to a fine of £2, with a month's imprisonment with hard labour in default of payment.

SCOTT V. SYTNER.

Building contract — Special agreement — Architect's certificates—Condition precedent—Appropriation of payments.

Mr. Schreiner and Mr. Thorne for plaintiff; Mr. Juta and Mr. Jones for defendant.

This was an action instituted by Messrs. W. & G. Scott, builders and contractors, Cape Town,

against Mr. L. Sytner, hotel-keeper, to recover a balance alleged to be due on the contract for the building of the Palmerston Hotel, Plein-street, Cape Town. The original contract for the building of the hotel was entered into on August 30, 1890, for £2,142, and £84 10s. for extras. In March, 1891, a special agreement was entered into upon a tender made on March 16 for the performance of certain additional work, the price for which was to be £210.

Plaintiffs alleged that at the request of the defendant's architect, Mr. Ransome, additional work was done at a cost of £19 14s., for which no agreement with the defendant was entered into. Payments amounting to £2,150 had been made, and action was now instituted for the recovery of the balance under the old contract, for extras, £76 10s.; the amount due under the special agreement, £210, and the £19 14s. for additional work, making £306 4s. in all. The original contract stipulated that the work should be done in seven months. In February, 1891, the upper floor of the hotel was taken possession of, and occupied by the defendant, and about the close of March it was alleged that the defendant assumed full possession of the building, and had been in occupation ever since. At that time plaintiffs confessed the walls were damp in places from the nature of things, and certain painting work had to be done in the billiard-room, bar, entrance hall, and elsewhere, and plaintiffs alleged that at the request of the architect these walls were painted whilst they were still damp, with the result that the paint peeled off and blistered on the walls. The effect of the painting had been to increase the dampness and make it more difficult for the work to be efficiently carried out. The defendant pleaded that he had paid £2,150, and that that amount included the £210 and the £84 10s.

Mr. W. Scott, one of the plaintiffs, deposed that the work had been performed according to the contract, and the architect raised no objection to the manner in which the work was carried out, nor was any complaint ever made regarding the material for the walls. When the walls of the ground floor were painted they were damp, it was usual to allow months to elapse before the walls were painted. He pointed out to the architect that the walls were unfit for paint, but the architect replied that defendant must have them painted, whereupon witness agreed to paint them, but at the same time informed Mr. Ransome that he knew what the consequences would be. In March the walls began to sweat and blister, and he told Sytner, in the presence of the architect, that what had happened was just what witness had expected. He had made repeated offers to complete the painting, but the walls were still damp.

By Mr. Juta: He knew that the walls were quite unfit for paint when they were coated. His excuse was that the architect requested him to do it. It was true that the architect sent his firm a letter objecting to the way some of the work was done, but that only referred to the doors. He could not say if it would injure the plastering when the paint was taken from the damp walls. He admitted that at a meeting in July last, between defendant, the architect and witness, he was to be paid for the painting on condition that he got the architect's certificate. He remembered asking Sytner on one occasion for money, when the latter refused to pay any money in the absence of Mr. Ransome's certificate. It was not true that the price of the second contract was reduced because items included in it were really embodied in the first contract.

By the Court: Under the second contract all work was to be under the supervision of the architect, and approved by him before payment.

Mr. Justice Smith: Why did you reduce the second contract by £103?

Witness: To save Mr. Sytner's licence and get the work out of hand

Mr. Justice Smith: Did Mr. Ransome ever certify for any amount under the second contract?

Witness: It was paid generally and not under one special contract. I applied for money, and generally got it on Mr. Ransome's certificate.

Re-examined: The difference in price between the second contract as originally drawn up and the contract as adopted was caused by the fact that in the first instance only a rough estimate was made.

Mr. G. F. Scott deposed that he was present at an interview between his brother, Sytner, and the architect when the latter authorised the painting of the walls, although it was pointed out that they were damp.

Further evidence in support of the plaintiffs' case was given by Messrs. James Scott, James Callaghan, James Lister, James Proctor, William Joetzen, Frederick English, John Parker, and George Smart.

For the defence,

Mr. George Ransome, architect, gave evidence that the last payment he made to William Scott, one of £400, included the £210 now claimed, and this left some money owing on the first contract, which provided that witness was to retain in his hands 20 per cent. of the contract money until the work had been completed to witness's satisfaction. Witness had stretched a point in Scott's favour, and had less money in hand at present than he could have claimed under the contract.

By Mr. Schreiner: It was fully explained to Scott that the £400 included the amount of the second contract, £210. The certificate for £500 he gave last February was less 20 per cent and less extras. Scott came to him and asked specially for the £210 and the extras. The deduction he

was entitled to make was a fifth of £2,142. He contended that if the walls remained wet for another season the plaintiffs would still have to wait for their money. It was not true that witness ever directed Scott to paint the walls whilst they were wet. That story was an absolute fiction, and he contradicted the plaintiffs flatly on that point. He understood the walls were not to be painted till they were dry, and immediately he found the men painting he had the work stopped.

The Chief Justice: Does it not seem unfair, when a builder has completed all his work save £20 worth of painting, that the architect should retain £300 or £400?

Witness said that was the custom, and that he was bound to protect the interests of his clients.

Mr. L. Sytner, the defendant, stated that he always understood under the contract that he was entitled to retain 20 per cent. of the contract price until after completion and the granting of the architect's certificate. He never told Scott that he wanted the hotel painted before the walls were properly dry. He never addressed Scott on the subject at all.

By the Court: When the architect asked him to pay the £400, it was understood that it included he £210.

Mr. W. Scott, recalled, said that when Mr. Ransome gave him the last certificate for £400, he did not state, so far as witness remembered, that it covered the £210 and the £84.

Cur ad vult.

Postea (Dec. 19.)

The Court delivered judgment.

The Chief Justice said. In August, 1890, plaintiff entered into a building contract with defendant, and a clause of the contract provided that payments were to be made on the certificate of the architect on the measured value of the work executed, less 20 per cent., one-half of which was to be paid on completion of the work, and the balance six months afterwards, on receipt of the architect's certificate. It was clear from that contract that it was a condition precedent before the plaintiff could recover that the certificate of the architect should be produced, and no such certificate being forthcoming, it was clear the plaintiff was not entitled to recover under the first contract. It appeared, however, that by the time all the works under the contract were finished, another contract was entered into between plaintiff and defendant, to which the architect was no party. The plaintiff undertook to execute the work mentioned in the second contract for £210, to be paid when the work was completed, and the payment was not dependent on the architect's certificate at all. It was true that with regard to the new contract both parties seemed to have supposed that the architect had something to say, but the mere fact that the plaintiff was under a mistake as to his true rights could not deprive him of those rights. It was one of the allegations in the declaration that the plaintiff had done the work and supplied the material under the second contract, and that was admitted in the plea, but defendant stated that the £210 had been paid, and the simple question for the Court to decide was whether the £210 due under the new contract had been paid or not. The Court had the statement of Mr. Ransome, that when he certified for £400 in April that sum included the £210 and the £84, and the plaintiff had very fairly said he could not swear that Mr. Ransome did not state that those sums were included, but he said he could not remember any such stipulation, and he (the Chief Justice) was convinced that if any such stipulation had been made the plaintiff would have remembered it. In the conflict of evidence, the Court would follow the ordinary course of looking to the documents, and in his opinion they rather supported the plaintiff's view. First of all, the certificates given on April 8, 1891, said nothing whatever about the £210, and in form differed but little from the other certificates granted by Mr. Ransome. If the matter had stopped there, some doubt might have arisen, but Mr. Ransome's letter of July 18 was wholly inconsistent with any actual appropriation having been made on April 8. In that letter Mr. Ransome spoke of a reduction of money under the second contract, and the use of that term showed that £210 was still payable by the employer. The rules of law in regard to appropriation of payments were well known. In the first instance, the debtor had the right to appropriate; if he failed, the creditor had the right. If the creditor failed, then the appropriation took place in regard to that debt which it was most for the interest of the debtor should be appropriated; and failing evidence on that point the earliest items should be paid off first. In the present case there was no clear evidence upon these points, but there was clear evidence that on July 18 there had been no appropriation so far as Mr. Ransome was concerned. The earlier items would be under the old contract, and the appropriation should therefore be made in respect of them. If that were so the sum of £210 was still owing, and in his opinion judgment should be given for the plaintiff for that amount. Then there were still some items remaining under the old contract, and as to that part of the case he was clearly of opinion that the defendant was entitled to retain those sums until the certificate of the architect was granted. It was satisfactory to find that the strict law of the case was also in accordance with substantial justice, and that the defendant would not be allowed to retain £306 because £20 worth

of painting had still to be done, but he would be allowed to retain about £86. In his opinion judgment should be for the plaintiff for £210 with costs, with absolution from the instance as regarded the balance.

Mr. Justice Smith dissented from the judgment. His Lordship said that both parties clearly considered that the two contracts were not distinct, and that the architect had supervision over the work, and had to certify for payment. Mr. Ransome had stated that plaintiff came to him in April, 1891, and asked for £400, which was given on the clear understanding that it included the £210 and the £84. He felt bound to believe Mr. Ransome that the £210 was so paid, and if he had been trying the case himself he would certainly have given a verdict for the defendant.

Mr. Justice Buchanan agreed with the judgment of the Chief Justice, and said that according to the architect's own evidence it was impossible to complete the painting work within the stipulated time. He was not inclined to think Mr. Ransome had stated anything which was false, but he was inclined to think that there had happened what occurred frequently in these cases, namely, that what had passed through the minds of the parties they thought they had expressed in so many words.

Judgment was therefore given for the plaintiff for £210 and costs, with absolution from the instance as regarded the balance.

[Plaintiffs' Attorneys, Messrs. Reid & Nephew; Defendant's Attorneys, Messrs. van Zyl & Buisinne.]

SUPREME COURT.

SATURDAY, DECEMBER 19.

[Before the Chief Justice (Sir J. H. DE VILLIERS K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

WESTERN PROVINCE TRUST COMPANY V. ROBERTS.

Mr. Juta moved for final adjudication of the defendant's estate.

The order was granted.

LUND V. LOUW.

Mr. Schreiner moved for provisional sentence on a dishonoured cheque for £341 6s., dated 1st October, 1891.

Mr. Juta read the affidavit of the defendant, J. J. Louw, who deposed that he gave the cheque in question to one Weeber, on the distinct understanding that it was not to be presented till the 9th or 10th of October. It afterwards came to the deponent's knowledge that Weeber discounted the cheque to the plaintiff, between whom and deponent there was a partnership dispute pending. Plaintiff on one occasion said to deponent by way of taunt that he held his cheque for £341 6s., whereupon deponent went to the bank and gave instructions not to pay the cheque if it were presented. Deponent had since found that he only owed plaintiff £181 6s. 9d., and if judgment were given for £341 6s., he would be obliged to apply for a refund.

Mr. Schreiner read an answering affidavit, in which plaintiff deposed that he obtained the cheque from Weeber for value, and was therefore its legal holder. He denied the alleged taunt, or that he had addressed defendant on the subject.

The Court held that there was not sufficient evidence before it to justify a refusal to grant judgment on the liquid document, and

Provisional judgment was granted as prayed.

HASSELL'S EXECUTORS V. HEROLD.

Mr. Watermeyer moved for judgment in terms of the consent paper put in.

Judgment was granted accordingly.

S.A. ASSOCIATION V. LEARY.

Mr. Maskew moved for judgment in terms of the consent paper put in.

Judgment was granted accordingly.

BRUCE V. WILLIAMS.

Mr. Webber moved for judgment on an unsatisfied debt of £19 1s. 9d.

Judgment granted.

JACOBS V. EAST.

Mr. Molteno moved for judgment for £8, being arrear calls on a share in the Waterloo Gold-mining Company, with interest and costs of suit. Counsel stated that the £8 having been paid all that was asked for was interest and costs.

Judgment granted.

KLINCK V. KLINCK.

Mr. Schreiner for plaintiff; defendant in default.

This was an action for restitution of conjugal rights, failing which for divorce and custody of the child of the marriage. From the statement of

the petitioner, Eliza Susan Klinck (born Roux), it appeared that the parties were married at Riversdale on November 29, 1886, and went to live at Calitzdorp, where they remained a year, when petitioner went to live at Stellenbosch with a Mrs. Kannemeyer. Defendant did not accompany her, but when she had been at Stellenbosch some months he came down, and they lived together for a month in Cape Town, at the end of which period defendant left his wife and went to Calvinia, where he had been since 1889. Petitioner stated that she had given her husband no cause to leave her, and that he had done nothing to support her for some years. She was willing to go to her husband if he would send her money, she was now supporting herself and child by giving music lessons at Stellenbosch.

The Court granted a decree of restitution of conjugal rights, the defendant to return to his wife, or receive her, by January 12, failing which a rule would be granted calling on him to show cause on February I why a decree of divorce should not be granted and the plaintiff given the custody of the child. Personal service of the present order.

PARTRIDGE V. PARTRIDGE.

Mr. Watermeyer for the plaintiff ; defendant in person.

This was an action for divorce on the ground of adultery. The parties were married in 1870, and there were three children of the marriage. Husband and wife lived together till 1889, when Mrs. Partridge brought an action against her husband for a judicial separation and maintenance. On that occasion judgment was given in terms of a consent-paper, and the parties then lived apart. During the present year it came to the knowledge of the plaintiff, by the report of a case tried in that Court, that the defendant was living in adultery with another woman, and the present action was instituted. Plaintiff asked for a decree of divorce, custody of the minor child, and an order of £3 per month against the defendant for the maintenance of his wife and child.

Defendant admitted the adultery, but stated that he was wholly unable to contribute anything towards the maintenance of his wife or children, or to pay the costs. When the judgment in 1889 was given, he handed over property worth £700 for the benefit of his family, and had given up everything he possessed. He was now without means, and out of employment.

A. W. Loader, a private detective, proved the adultery of the defendant with a Mrs. Bodley, the wife of a tobacconist at Kimberley, who recently obtained a divorce.

Mr. Watermeyer said that as to the property, it was burdened with £276 of debt and mortgage, and was in the hands of a public body, the rents being applied to the discharge of the debts. So far Mrs. Partridge and her children, one of whom was a minor, had not received a penny.

After consultation with her counsel,

Plaintiff stated that she would not press her claim for maintenance

The Court granted a decree of divorce, with costs, against the defendant, plaintiff to have the custody of the children, the Chief Justice remarking that it was solely because Mrs. Partridge offered to maintain herself and her child by her own industry that the Court did not make an order as to maintenance

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

MONDAY, DECEMBER 21.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REHABILITATIONS.

The Court granted the rehabilitations of Hendrik Jacobus Kuhn and William Williams.

THE ESTATE OF THE LATE MARTIN MCNAMARA.

Mr. Shiel moved to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act of 1881, for transfer to the said estate of certain lots of ground, portions of the Jennings property situated at Port Elizabeth.

The order was granted.

PRINCE V. PRINCE.

Mr. Jones moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action against her husband for separation, custody of the children, and maintenance.

The rule was made absolute, and Mr. Jones appointed to act as counsel.

PELSER V. VAN DER LINDE.

Mr. Juta moved for leave to attach *ad fundandam jurisdictionem* of this Court certain half-share of the farm Rooipoort situated at

Xalanga, in an action about to be instituted by applicant for respondent's share of quitrent thereon.

The order was granted, and made returnable on the first day of next term, personal service to be effected.

THE INSOLVENT ESTATE OF NICOLAAS J. BOTHA.

Mr. Juta moved to make absolute the rule *nisi* for the removal from his office of trustee to the said estate of Paul Nel, a resident at Pretoria, South African Republic.

The rule was made absolute, and the Court granted Mr. Sheard, trustee in the estate, an extension of time of six months from November 20, 1891, in which to administer the estate.

PETITION OF WILHELMINA S. M. ODENDAAL.

Mr. Searle moved for a rule *nisi* requiring petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his adultery.

The rule was granted, and made returnable on January 12.

PETITION OF ELIAS MARK.

Mr. Juta moved for a rule *nisi* requiring one Solomon Koske to show cause why applicant shall not be allowed to sue him *in forma pauperis* in an action for restoration of certain articles of gold and silver deposited with him by way of pledge.

The rule was granted, and made returnable on January 12.

KUUN V. ATTORNEY-GENERAL.

Bail bond—73rd Rule of Court—Indictment—Notice of trial—Sufficient service—Recognizance estreated—Writ of execution.

Mr. Juta moved for an order setting aside certain writ of execution for £50 issued against applicant in respect of the amount of a bail bond which he entered into to secure the attendance of one Gideon A. Jacobs, committed for trial on a charge of contravening the provisions of the Land Beacons Consolidation Act, 1865.

Counsel read the affidavit of the applicant, from which it appeared that the bail bond was entered into on the understanding that the prisoner should accept service at Victoria West, but that no such service was made. The prisoner was indicted at the recent Criminal Sessions at Cape Town.

Mr. Giddy appeared for the Crown, and read the affidavit of Mr. H. R. Dale, of the Attorney-General's Department, who deposed that service was not made as orginally intended for the reason that Jacobs had absconded, and was not to be found. Service, however, was made upon his wife at his address, every effort having been made to discover Jacobs himself.

Mr. Juta referred to the 73rd Rule of Court, and argued that as the defendant had elected to have the indictment served on him at a certain place, and that as the Crown had not done that, the recognisance could not be estreated.

Mr. Giddy read the affidavit of A. van Tromp messenger of the R.M. Court at Fraserburg, to the effect that deponent attended at defendant's house, where he shut himself up in a room, and would not accept service. He then served the indictment and the notice on the wife, but her husband called to her to throw them out of the window, which she did, whereupon deponent placed the indictment opposite the house, placing a stone on it to prevent its being blown away. Afterwards deponent saw defendant entering the house of one Van der Volk, and went up to him and explained the indictment and notice, which he then again served on the wife at defendant's house.

Mr. Juta contended that his client could claim his strict rights under the bond, and that as the bond stipulated for service at Victoria West, and service not being effected there, he was not liable on the bond. Kuun had warned the Resident Magistrate that Jacobs intended flight; but the Magistrate did nothing at all to incarcerate him until his trial.

Mr. Giddy said that immediately the Magistrate received notice from Mr. Kuun steps were taken to arrest Jacobs, who was sought all over the country.

The Chief Justice said that the bail bond could not be estreated unless a copy of the notice and indictment had been served upon the defendant or left at the place specified, and the question was as to whether that had been done in the present case. The facts were of such a nature that in his opinion the Sheriff would have been quite justified in stating in his return that the notice had been personally served. The messenger entered defendant's house and found his wife, upon whom he served a notice. Later on he saw defendant and explained the indictment and notice to him, and then went to his house and served the notice on the wife again. Her husband told her to throw the document out of doors, which she did. Under those circumstances it would be folly to say there had been no service. The application must be refused with costs.

MUSZLAK V. COLE.

Landlord and tenant—Forcible entry—Interdict—Costs.

Mr. Giddy moved to make absolute a rule *nisi* interdicting the respondent from further breaking down or interfering with the kitchen and other premises on the property in Loop-street of which applicant is the lessee, until the respondent shall have provided other suitable premises in their stead. Counsel stated that the applicant was the lessee of a house in Loop-street, which respondent recently purchased. He approached the applicant, and as the result of a conversation between them an agreement was entered into whereby Cole was to take the kitchen and water-closet, on condition that he erected new rooms for the applicant, who now stated that the respondent had not supplied the new rooms, but had broken down the walls of the kitchen and water-closet, and rendered them impossible to be used. Applicant therefore prayed for an order ejecting the respondent.

Mr. Searle appeared for the respondent, who deposed that he purchased the property at a time when Muszlak's tenancy was nearly at an end. An arrangement was arrived at, however, whereby deponent was to have the use of the kitchen and small room, on condition that he supplied kitchen accommodation and water-closet for the use of the applicant and reduced the rent from £6 to £5 10s., applicant to have the option of leaving the house on a month's notice. Applicant had agreed to deponent's conditions in the presence of two independent witnesses, but when the workmen were sent to perform the alterations they were refused admission altogether. Counsel stated that the respondent had no wish to ask for anything unfair, but he had purchased the property for the purpose of extending his trade, and naturally desired the use of the kitchen and pantry. He had no objection to supply Muszlak with temporary kitchen and water-closet accommodation, provided he were permitted to proceed with the alterations to the property.

Mr. Muszlak, in reply to the Court, stated that the stove promised by Mr. Cole did not arrive till noon of the day when the workmen commenced breaking down the kitchen. For five hours he was without kitchen accommodation. That was before the interdict was applied for.

Mr. C. J. Cole said the stove was sent at eight o'clock on the morning of the 15th, before the interdict was applied for. Muszlak refused to allow the men to fix the stove in position.

Mr. J. H. Comyn deposed that he was present when the parties agreed to the arrangement under which Cole was to have the use of the back premises of Muszlak's house, and corroborated Cole's affidavit on that point. Muszlak had refused to allow witness to enter when he attended to fix the stove and the temporary water-closet.

The Chief Justice, in giving judgment, said that the applicant was in peaceful possession of the premises, under an agreement with the respondent, and the latter ought not to have taken the law into his own hands, but as he was now willing to place the stove in position and allow access to the water-closet the rule might be discharged. The respondent, however, would have to pay the costs. As to the facts of the case, he confessed that he was inclined to believe Mr. Cole's evidence.

Mr. Justice Smith said the whole matter was a high-handed proceeding, and unnecessary also, since the tenant could have been got rid of on a month's notice.

The rule was accordingly discharged, with costs against the respondent.

CAIRNCROSS V. SHEARD.

Insolvency—Ordinance 6 of 1843, section 103—Deed of sale—Election by trustee.

Mr. Schreiner appeared for the applicant, and Sir T. Upington, Q.C., for the respondent.

This was an application by Mr. John Cairncross, of Oudtshoorn, calling upon the respondent (in his capacity as trustee of the insolvent estate of P. J. S. Terblans) to show cause why he should not be ordered to elect whether he would or not abide by, execute, and carry out a certain deed of sale made and entered into between the aforesaid P. J. S. Terblans and one Jacobus Esaias Meyer on the 6th May, 1884, and should he elect to take over the deed, why he should not forthwith pay the sum of £125, being the balance of the purchase amount of the property thereby sold, or having elected not to take over the said property, why he should not be ordered forthwith to deliver over the said property to the applicant. It appeared from affidavit that Mr. P. J. S. Terblans, prior to his insolvency, namely, on the 6th May, 1884, purchased from his brother-in-law, J. E. Meyer, certain landed property of which the vendor became possessed under the will of his mother and surviving father, Nicolaas Meyer. J. E. Meyer, shortly after his mother's death, was shown by his father what portion of the farm he was to occupy, as directed in the will; whereupon he took possession of the landed property pointed out to him, built a dwelling-house, together with outbuildings, and commenced to irrigate the land, making improvements to the value of at least £300, all which buildings and improvements he made with borrowed money. In the early part of 1884 he found himself in financial difficulties, whereupon his father advised him to sell

his interest under the will to his brother-in law the aforesaid P. J. S. Terblans, the father at the same time advising his son-in-law to purchase the said interest at the price mentioned in the deed of sale, at the same time promising to give Terblans transfer when the testator's minor son, S. S. Meyer, became of age. Acting upon the faith of this promise Terblans purchased the property and paid his brother-in-law Meyer the purchase price agreed upon except £125, which latter amount was to be paid when S. S. Meyer came of age. In July, 1886, J. E. Meyer surrendered his estate as insolvent. On the 12th October, 1886, the trustee of the insolvent estate of J. E. Meyer sold by public auction the insolvent's rights under the said deed of sale, which included the £125 balance of the purchase price above referred to. One Samuel Hulme became the purchaser of these rights, and some time afterwards pledged the balance of £125 to applicant as a collateral security for moneys advanced. In April, 1891, Hulme ceded his rights as aforesaid to applicant for £125 and the latter became the legal holder thereof. In December, 1890, S. S. Meyer became of age. In March, 1891, Hulme obtained judgment against Terblans in the Circuit Court at Mossel Bay for the amount of the balance due (£125) on the said deed of sale, whereupon Terblans surrendered his estate. At the third meeting of Terblans's creditors a resolution was passed empowering the trustee to take counsel's opinion concerning the rights of the insolvent under the will of the late J. S. Meyer and surviving spouse Nicolaas Meyer, and also concerning these rights purchased from J. E. Meyer, and to act upon said opinion. On the 28th May, 1891, applicant wrote to the trustee concerning his claim, and after some further correspondence had taken place the trustee wrote to applicant stating that he declined to admit his claim, as section 103, Ordinance 6 of 1843, did not apply to applicant's claim. At a special meeting of creditors held in November last the trustee was authorised to sell the rights under the will of the late J. S. Meyer and surviving spouse Nicolaas Meyer. In consequence of this resolution, and of the trustee's refusal to recognise applicant's claim, the present application was made.

Mr. Schreiner, for the applicant, contended that the 103rd section did apply, and that the trustee should be put to his election as to whether he would abide by the deed of sale or admit applicant's claim as preferent for £125 and interest.

Sir T. Upington, Q.C., for the trustee: The 103rd section does not apply; that section only has reference to contracts pending but in respect of which nothing definite has been done.

Cur ad vult.

Postea (January 5th, 1892).

The Chief Justice delivered judgment. His Lordship said the application was made under the 103rd section of the Insolvent Ordinance, which enacted that the Court had the power of making an order calling upon trustees to deliver up the agreement and the possession of the premises to the vendor or anyone entitled to claim under him under certain circumstances, but in the present case it was clear that no such order could be made, for the reason that the parties mainly interested were not before the Court. It appeared that one Meyer sold his inheritance to his brother-in-law, Terblans, and £125 was left still unpaid. The right to receive the £125 was sold by the trustee in the insolvent estate of Terblans to one Hulme, who sold it to Cairncross, who now brought a motion to enable him to recover the £125. It also appeared, however, that under the will of Meyer's father there was an express provision that the heirs should not be allowed to alienate, except to their co-proprietors, and that on the insolvency of one or more of them his or their shares should pass to the co-proprietors, and the difficulty now was that these co-proprietors were not before the Court. Without having those persons before it the Court would make no order depriving them of their rights under the will. The Court was of opinion that this was not a case in which the 103rd section was intended to apply, and the application in its present form would therefore be dismissed with costs.

SUPREME COURT.

(IN CHAMBERS.)

TUESDAY, DECEMBER 22.

[Before Mr. Justice BUCHANAN.]

IN RE UNION BANK, IN LIQUIDATION V. BEIT.

Mr. Schreiner moved for the appointment of a commission *de bene esse* to take the evidence of the defendant in the above suit, who is leaving for England on the 30th instant, and also to take the evidence of Mr. Edward Lippert.

Mr. Searle opposed the application, on the grounds that the absence of Mr. Alfred Beit at the trial would seriously prejudice plaintiffs' case.

The Court granted the commission, and appointed Mr. Tredgold commissioner.

IN RE THE MINOR CATHARINA H. SPANGENBERG.

Mr. Searle presented the petition of Mr. J. M. Spangenberg, the father and natural guardian of the above-named minor.

It appeared from the petition that petitioner in October, 1875, purchased a certain piece of land situated at Mostert's Bay, Hottentot's Holland, in the division of Stellenbosch, for a sum of £10, and had the same transferred to his minor daughter, and that the said piece of land has since considerably increased in value. That the Court on the 29th May, 1890, granted petitioner leave to mortgage the said land for £500, he binding himself as surety for the due interest on the bond and taxes on the property. That the amount of the said mortgage was devoted to the erection on the said property of a building just completed, to be used as an hotel and boarding-house, at a total cost of £1,500. That petitioner had advanced moneys and pledged his credit to the amount of £1,000 in connection with the said building, and that a sum of £500 was now required to liquidate the outstanding liabilities thereon. That petitioner could obtain a sum of £1,000 on first mortgage of the said property, whereof £500 would be devoted to paying off the existing mortgage and the balance of £500 to the liquidation of the liabilities incurred in connection with the building. That petitioner was prepared to bind himself as surety for the said sum of £1,000 and the interest thereon, and to mortgage certain other properties valued at £1,250, subject to an existing mortgage thereon of £800. The petitioner prayed that the Court would authorise him to pass a first mortgage on the property transferred to his minor daughter for the sum of £1,000.

His Lordship remarked that the whole proceeding was very undesirable, and ordered the matter to be referred to the Master for report.

DUMPER V. THE DUMPER DEVELOPING SYNDICATE.

Mr. McLachlan, on behalf of applicant, moved for leave to sue *in forma pauperis* in an action about to be brought against the defendant company.

The matter was referred to counsel for his certificate.

APPENDIX.

EASTERN DISTRICTS COURT.

THURSDAY, JUNE 11TH, 1891.

[Before Sir JACOB BARRY (Judge President), Mr. Justice S. T. JONES, and Mr. Justice C. G. MAASDORP.]

DESCHAMPS V. VAN ONSELIN.

The Judge President delivered judgment as follows: This case has been removed from the Supreme Court for trial at the Circuit Court of Port Elizabeth, and from there to this Court. The declaration states that on October 18th, 1858, one Landman sold to defendant one-fifteenth share in the farm "Hartebeestfontein," district of Humansdorp, for £200; that on April 1st, 1859, Landman passed transfer of it to defendant, who paid £100 on account of the purchase amount; that on Oct. 20th, 1868, defendant signed an acknowledgment of debt in Landman's favour for the balance of £100, payable 20 years after date with interest at 2 per cent. per annum, which interest defendant paid up to 1876 in terms of a memo.; that Landman then died, his wife (married to him in community of property) being appointed his executrix; that this acknowledgment of debt being mutilated, defendant signed a new one in the same terms as the former; that on March 7th, 1883, Landman's wife, for herself and as executrix, for valuable consideration ceded to plaintiff all her right and title to this £100, with interest due and to become due, and handed plaintiff the acknowledgment; that on Sept. 26th, 1890, the terms of this cession were embodied in a document signed by Landman's wife; that all things have happened to enable plaintiff to recover this £100 from defendant, who has neglected and refused to pay it or any portion of it, though requested. The prayer is for £100, with interest at 2 per cent. per annum from 1876. The document of Sept. 20th, 1860, signed by Landman, was annexed to the summons and copy thereof served on defendant, and in it, it is distinctly stated that £38 was the consideration paid on March 7th, 1883. The plea entered before removal from the Supreme Court is that defendant is married to a daughter of Landman, who being desirous to provide for his children (including defendant's wife), transferred on behalf of these children certain immovable property, of which "Hartebeestfontein" being part was transferred to defendant as husband of this daughter as a donation and not by way of purchase; that defendant did on Oct. 20th, 1869, sign an acknowledgment to pay Landman £100; but denies that it represented the balance of the purchase price of this farm, but says that it was executed as a security to Landman for the payment of the interest therein mentioned as part provision for the maintenance of himself and wife, which was duly done, and thereby the necessity for such maintenance having ceased, as it did before action, the acknowledgment was and is null and void. Defendant admits that he paid interest to Landman as alleged up to 1876, but denies the mutilation and substitution of the acknowledgment or cession to plaintiff as alleged in the declaration. The replication was general. At Port Elizabeth defendant seems to have abandoned the only defence pleaded, and in a consent-paper, drawn up and signed by the attorneys on both sides, the following facts are presented to this Court, viz., "That full consideration was given by defendant to the payee of the original promissory note for £100 (this does away with the special plea); that the promissory note was passed by the executrix of the payee to plaintiff for £38, being partly in payment of a debt due by her to the plaintiff and partly for cash paid to the executrix by the plaintiff; at the time of the transfer of the promissory note to plaintiff it was agreed between plaintiff and the executrix that in consideration of the risk attaching to the recovery of the amount of the acknowledgment of debt, and of the period still to elapse before the due date of the same, the plaintiff should pay the lesser sum of £38 for the acknowledgment and should take upon himself all the risk attaching to its recovery." This is the entire record and all the evidence. It does not appear from the record, or the judge's notes, that the defendant expressly abandoned his plea, which still remains on the record as the only plea pleaded. In it he denies that there was ever any obligation on his part to pay the acknowledgment for £100, which he says was executed by him merely as a security to Landman for £2 a year as part provision for the maintenance of Landman and his wife, which obligation having before action ceased, the acknowledgment was a nullity. If this had been

proved, the plaintiff would have suffered a total loss of his £38 and interest and costs of his suit. The executrix had guarded herself against any recurrence upon her by her agreement of March 7th, 1883. It is true that the defendant, by his admission in the consent-paper, supplies the Court with evidence disproving his allegations in the plea, but the plaintiff oints to the plea and says that it is not in defendant's mouth now to say that it was an undoubted obligation by him to pay this £100, and that the risk of loss, and even total loss of the £38, did not attach to the purchase of this acknowledgment. It does not appear from the record or judge's notes, or from anything stated by defendant's counsel, that before the removal of the case from Port Elizabeth, defendant claimed any right of stepping into plaintiff's shoes, either by tendering the £38 and interest or even by offering to pay it. No such offer has hitherto been made by defendant, and the Solicitor-General's statement, that the defendant's ability to pay the £38 is questioned, is not contradicted for the defendant, whose counsel only contends that upon the evidence as it now stands the plaintiff was never entitled and never can be entitled to a judgment for more than £38 with interest. From the record and consent-paper I must assume that full consideration was paid by Landman for the promissory-note for £100 before Oct. 20th, 1889, and that it bears interest at only 2 per cent. per annum, payable Oct. 20th, 1889; that at Landman's death it was by his wife and executrix, on March 7th, 1883, and at a time when this interest at £2 a year was in arrear or unpaid more than 6 years, transferred to plaintiff, who in addition to paying £38 (consisting partly of a pre-existing debt due by the executrix to plaintiff, and partly for cash), undertook all risks attending recovering the amount of the acknowledgment, which risks included the risk of its being found not to be an acknowledgment to pay anything except £2 a year direct to the Landmans for maintenance, and nothing to anyone else as (and because) pleaded by defendant, also the risk of defendant's ability to pay anything even if the obligation be not disputed, defendant's inability being evidenced by the circumstance that his last payment (of what he calls interest at one time and maintenance at another) of £2 a year was made more than six years before, and the further circumstance that the very long credit which still attached to the acknowledgment secured by nothing, made the risk of loss not improbable, and that to secure the uncertain chance of getting £100 in 1889 with 2 per cent. added, plaintiff actually parted with £38, which with interest added at 6 per cent. would have earned about £25 before Oct. 20th, 1889, or a total of £63. ———

To these facts we are to apply the law. What that law is, is disputed. Defendant's counsel does not contend that defendant is not now liable for anything, that the action is wrongly brought on the acknowledgment, or that defendant has tendered or even offered, or is able to pay the £38; but that by the *Lex Anastasiana* (known to the Civil and adopted by the Roman-Dutch law) plaintiff never could and cannot now recover more than at most £38 with interest, and relied upon *Grotius* (3. 16. 14), who says: "Whenever a *jus in personam* is sold to a third party, the debtor may, at any time when called upon, retract the claim." In commenting upon this passage, *Van der Keessel* (663) says: "Where such a right is not allowed by law, the party who owes a debt so sold and which is not secured by a special mortgage, when summoned by the purchaser, may always claim the right of the *Lex Anastasiana*, even though he may not have been ignorant of the sale of the debt," and in 664 he adds: "The *Lex Anastasiana* does not however apply (1) in a sale of the entire body of accounts and (2) in a sale of Dutch securities, as correctly laid down in the *Hollandsche Consultatien* (V. 5, Cons. 89), and acknowledged and supported by valid reasons by the States of Holland in a Consultation issued to the States of Groningen on Dec. 28th, 1759." Plaintiff's counsel replies (1) that there is authority in *Groenewegen de Leg. Ab.* (34. 38. 22 and 23) for the proposition that this prohibition does not exist in the Roman-Dutch law. The passage runs thus: "Imbert and others affirm that those laws are abrogated by our customs, but this is denied by &c., &c. What then is to be said? I, though I do not claim to be more learned, will nevertheless, state freely what I think, namely, that by our customs if any one has obtained a cession of action upon payment, he may sue not only for the amount of the money paid by him together with interest thereon, but may claim the whole of the debt, saving to the debtor the right of retracting within a year from the time of his having knowledge." But, inasmuch as *Groenewegen* was succeeded by *Voet* who (18. 4. 18 and 18. 5. 20) recognises the validity in Holland of the *Lex Anastasiana*, we cannot treat it as now unknown to the Roman-Dutch law. Plaintiff next contends (2) that the *Lex Anastasiana* contains an exception in favour of a cession which a creditor has received in payment of a pre-existing debt due to him, and that plaintiff received cession of this acknowledgment at least in part payment of a pre-existing debt as is admitted in the consent-paper. Lastly, plaintiff contends (3) that he did not buy the debt with the object of vexing defendant in a lawsuit but for a just and reasonable cause, giving not merely money, but incurring great risk of losing what he gave, owing to the uncertainty of recovering anything on the obligation the validity of which defendant has disputed, and which in any

circumstances was not payable for more than six years; and that inasmuch as the declared object of the Anastasian Law was only to prohibit dabbling in lawsuits, and not forbid the purchase of risky obligations such as the present, the advantages of the purchase should go to the plaintiff, who has risked a total loss of what he paid. The *Lex Anastasiana* is found in Code 4, 35, 22, which says: "As some persons coveting the property and fortunes of others procure cessions of actions belonging to others to be made to themselves, and in this way attack divers persons with the vexations of lawsuits, though it is certain that those with whom the agreement was originally made would wish rather to recover their own under their undoubted obligations, than to transfer them to others: now therefore we declare by this law in future that such attempts be prohibited, for there is no doubt that those who wish to get such cessions are to be regarded as (*redemptores*) speculators in the lawsuits of others, but in such a way however that if a person has obtained a cession for a money payment, he will be allowed to recover only up to the amount which has been paid, with interest; with the exception however of cessions which may be made between co-heirs with respect to actions belonging to the inheritance, and those which a creditor has received in payment of his debt." Code 4, 35, 23, says: "A most just constitution as full of humanity as benevolence was granted by Anastasius that no one should acquire another's debt by cession made to him, and that he should not recover more from the debtor than what he has himself paid to the cedent, except in certain cases which are specific in that constitution. But since those who dabble in law-suits" (and then proceeds to deal with pretended donations). Code 4, 35, 24, adds: "The present constitution refers to the constitution of Anastasius enacted with respect to cessions, and commanding that a person who has given money in order to have actions ceded to him, can recover nothing more on such ceded actions than what he gave for them. But since certain persons are excepted in that constitution, it enacts that the same law shall apply to those persons also, and that the exception of that constitution is not to be observed, but that the person who has given money will receive only that together with interest and no more." The Solicitor-General contends that C. 4, 35, 22, and C. 4, 35, 23, contain the law of *Justinian* which is the only part of the Civil Law that has ever been recognised in Holland, and that C. 4, 35, 24, is an interpolation of something which was only imported into what is now called the Code about A.D. 828, it being in reality the *Basilica*, an Eastern Code not brought into existence till about that time, and that if we discard this C. 4, 35, 24, the previous sections import as an exception, a creditor who, like the plaintiff, according to the consent-paper, has received the cessions in payment of his debt, and that the fact that it is only in part payment does not exclude him from the benefit of the exception. I am not aware however that any authority supports the contention that only what *Justinian* himself has embodied in the Code can be regarded as Roman-Dutch Law. But in the present case it would seem, according to *Mackeldey*, that the *Basilica* was actually portion of the Code of *Justinian*, and that having been omitted from previous collections it was subsequently restored to the Code. It is clear, moreover, that Voet, 18, 4, 18, *does* refer to all the sections of the Code already mentioned, when he says, "that the rule obtained by our customs, that a debtor who is sued upon a ceded action may require the plaintiff to swear at the very commencement of the action at what price the debt was bought by him, in order that the debtor may release himself by tendering that amount, the benefit of the rest going to the debtor, as is clear from the fact that all further action for what the purchaser has given beyond this is denied to both purchaser and seller; nor will it be enough in such case to swear to the price which has been promised, but it must be sworn how much has already and without fraud been paid or given by the purchaser," quoting C. 4, 35, 24, and Holl. Cons. 3, 2, 34, adding "and what has been said of purchase and sale applies also to giving in payment, because in that also, as in the case of sale, retraction is allowed, as was stated in the preceding title; and giving in payment has the same force and effect as a sale, the debt being regarded as sold for the amount of the debt in payment of which it has been ceded." If *Voet* be correct, the *Lex Anastasiana* has been embodied in the Roman-Dutch Law subject to no exception in favour of a person who like the plaintiff has received the cession wholly or in part in payment of a pre-existing debt. And therefore on this ground we cannot regard the Solicitor-General's first contention as correct.

I cannot however come to the conclusion that the *Lex Anastasiana*, as set forth in Cod. 4, 35, 21 prohibited the present sale. The *Lex* begins by describing what class of rights of action and what sorts of cessions are to be prohibited, namely, undoubted obligations which covetous persons attempt to obtain with the object of dabbling in lawsuits, with the object of vexing debtors and taking advantage of the circumstances of the original creditor by getting from him what he would rather not part with, and then having stated this, the enacting part of the law does not generally prohibit all cessions but only those of the character described. It may be that what is limited to certain sorts of purchases in this was by the Roman-Dutch Law extended to all

purchases of rights of action, and it is said by *Voet* (18, 4, 18) "that a rule has grown up in our practice that when a debtor is sued in pursuance of a transferred right of action, he may require the plaintiff to declare on oath for what price he bought the claim, so that the debtor may discharge himself by tendering the same amount." It is also said that the general rule is subject only to certain exceptions, two of which are stated by *Van der Keessel* and another added by *Voet*, and that the general rule is only qualified by these so-called exceptions. But seeing that *Voet* in stating this rule refers to *Hollandsche Consultatien*, Vol. 5, Con. 89, with apparent approval, and in 18, 4, 20, says "that this right of tendering the price, in other words, of retraction, is barred—in the sale of a number of rights of action collectively, because the price for each cannot be defined — notably where claims have been purchased at a cheaper rate owing to the calamities of war or other like troubles, so that the purchaser runs a risk of total loss; since it is fair that the advantage derivable from a thing should go to the person who suffers the disadvantages, and that the hope of gain should belong to him who has had the fear of loss. Opinions have been given to that effect by various Dutch jurists. The same view has been confirmed by a decree of the States-General of Holland, and has been specially applied to claims vested in the governing bodies of provinces and municipalities which had been sold at a sacrifice in critical times of war"; whether we call this an exception or treat it as an illustration of cessions under circumstances to which the prohibition does not apply, it seems to me that the special circumstances in the present case are outside of the rule and come within the meaning of the term *alia incommoda*, because the risk run by plaintiff, added to the substantial price he gave, shows that the executrix got full value for her right of action, and even if we consider the exception to apply to cases where the purchaser runs the risk of a total loss, the defendant's plea debars him at least from saying that plaintiff did not run such risk. If we look at the *Hollandsche Consultatien* (Vol. 5, Con. 89), to which *Voet* refers with approval, it appears that the jurisconsults refer to Code 4, 35, 22 and 23, as stating the law, and add: "As the above texts only speak of the purchases of others' lawsuits with the object of vexing and attacking, and as the actions or loans which originally belonged to citizens of other States, and are now alleged to belong to citizens of this State, who have by cession obtained right to the same during the war, it cannot be said that the claimants have obtained cession with the object of vexing or buying a lawsuit, but rather that the same has taken place for some just and reasonable cause in consideration of the uncertainty connected with the recovery and acquisition of the same, the result of which depended absolutely on an uncertain event, inasmuch as in the case of war the cessionaries might have recovered nothing, and might even have lost the money paid, and inasmuch as they have the risk of the said price ***" and add: "No one in these troublous times would have given more for them," and quote with approval an opinion that the "*Lex Anastasiana* does not apply if together with the debt and the action purchased the risks and uncertainty of recovery are also transferred to the purchaser, because such a cession has a reasonable cause, and the lowness o the price is compensated by the risk of the uncertainty, nor can it be said to have been made with the object of vexing or buying a lawsuit," and add "that Trent says that the constitution ceases to apply if the ceded action would very likely not have been worth more than what was paid for it, and that consequently the ceded action may be prosecuted for the full amount." This reasoning approved by *Voet* gives rise to what is called an exception to the rule, but which in reality only shows that there are circumstances under which cessions of action are not prohibited, and that the law does not prohibit purchases for which fair value is given in addition to risk of loss being incurred, provided the object be not to vex the debtor with lawsuits. Such an object cannot be said to exist here, and if there be a desire to vex in this way, the plea of defendant rather proves that vexation has been his object and not plaintiff's, and as I think that the executrix got fair value for what she sold, there is no prohibition to sell, and plaintiff can recover the whole debt, which defendant moreover cannot be heard to say was an undoubted obligation. It also appears to me doubtful whether the defendant would have been entitled to claim the benefit of *retractus* without stepping into plaintiff's shoes or at least offering to do so. This he has never done. *Voet* in the passage quoted seems to imply that there should be a tender of the price found to have been paid for the debt preliminary to a debtor succeeding to the rights against himself under the obligations. As my brother judges concur in reducing the amount of the judgment to £88 with interest from March 7th, 1883, that will be the judgment of the Court, and in my opinion that judgment ought to carry costs to date, inasmuch as the argument here was a mere continuation of the trial at Port Elizabeth, where if judgment had been given it must have carried costs. I need scarcely point out that if the judgment of this Court be correct, it will be found to be a very inconvenient one in a mercantile community, and that inasmuch as creditors have no longer the power over debtors which existed in times past, some amendment of the law would be desirable,

Mr. Justice Jones: In this case I very much regret that I cannot concur in the judgment delivered by the Judge President. The defendant in my opinion, though he set up a plea in the Supreme Court before the case was sent to the Circuit Court at Port Elizabeth, to all intents and purposes withdrew this plea before coming into the Circuit Court, and agreed to a certain statement of facts, leaving merely a legal point to be argued in this Court. I certainly understood that the only case to be heard here was whether under existing law the plaintiff could recover the whole amount claimed by him, namely £100 and interest, or the lesser sum which the plaintiff, as cessionary of the debt, had given for the debt of the defendant, namely £38 with interest from the date at which this sum was paid by the plaintiff to the estate of Landman. In fact the position in the Circuit Court appeared to me to be that the defendant was willing to confess judgment for the smaller amount, but the plaintiff claimed a larger sum. As a matter of fact, it appears now that he never actually made a tender.

Under the Roman Law as it stood before the end of the fifth century, there was no impediment to the transfer of actions by cession except in the case where the transfer was made to vex a debtor with a more powerful creditor (see Hunter's Roman Law, p. 448). This exception was apparently introduced by the Emperors Arcadius and Honorius at the end of the fourth century or early in the fifth (Code 2, 14, 2).

During the reign of the Emperor Anastasius (A.D. 491-518) a more effective remedy was introduced, namely that which was stated by the passage cited by the Solicitor-General from the Code (4, 35, 22), and already read to-day by the Judge-President. This constitution was specially directed against speculators in lawsuits—against, in other words, the purchase of debts due by others for less than their nominal value. It provided generally that when a person purchased a debt for less than the amount of the debt, he should only recover what he had paid for it and the legal interest; but to this rule certain exceptions were made, and among those exceptions is one upon which the plaintiff now relies, namely that of a creditor receiving a cession of action in payment of a debt due from the cedent to himself. This exception was considered applicable, certainly, where a man borrowed a sum of money and ceded in payment of it a debt due from another person which was for a larger amount (Mackeldey, *Systema Juris Romani Hodie Usitati*, sec. 338). When *Justinian* promulgated his second Code (in A.D. 528) the constitution of Anastasius was retained and modified. The exception above referred to was apparently retained also in the editions of the Code, more especially in the glossed editions which were published before the time of Accursius (A.D. 1260), who collected the glosses of the previous glossators and published what is generally known as the *Glossa Ordinaria* (as to which see Mackeldey, Sec. 80). Many of the constitutions, however, which were in the second Code of Justinian, were by the negligence of transcribers omitted in the later copies, but about the sixteenth century were restored, chiefly owing to the labours of Augustinus, Charonda, Cujacius, and Curtius. These writers, for this purpose, used the *Basilics* among other sources of information. When a *Basilic* is found in an edition of the Code, it is consequently necessary to inquire precisely the reason for its being there. As a *Basilic* merely, it would not necessarily have any authority, though many passages in the *Basilica* are of the greatest use when referred to for the purpose of interpreting doubtful passages in the Code, Digest and Institutes, and explaining the historical development of the Roman Law in the Eastern Empire during the three centuries after the era of Justinian (as may easily be seen upon reference to the works of Cujacius, who died in 1590). It is quite true to say, as the Solicitor-General did, that the *Basilica quâ Basilica* have not necessarily any authority, as Basil I. had no power to legislate for the Western Roman Empire, nor had his son Leo VI. (the Philosopher) nor had Constantine VII. The *Basilica* merely contained the law as it was in force in Greece in 887 A.D. and the jurisconsults who made the collection consulted chiefly those commentaries on Justinian's law which had been written in Greek, but they undoubtedly also consulted the constitutions which had been promulgated by Justinian and his successors, and consequently they have often given us the constitutions which were really in full force under Justinian and formed portions of his legislation, though they would have been lost to us if the edition of the *Basilica*, published under Constantine VI., had not come down to us. But it should be noted that even Justinian's legislation did not bind the Courts of the Netherlands by virtue of any legislative power vested in him, but rather owing to the gradual adoption of that law into the common law of Holland as a supplement to fill up the gaps left in their own customs and local statutes. Now among the restored passages which appear in the Code, as we now have it, there appears (Code 4, 35, 24) the following: "*Inveniens autem in ea quasdam personas exceptas præcipit et in iisdem personis hanc legem observari, neque superioris legis exceptione uti, sed ut emptor pecunias recipiat aut usuras.*" If this passage be law then the exception in the Constitution of Anastasius, which is relied upon by plaintiff, is swept away.

Now it seems clear from Mackeldey that this passage is taken from a Constitution of Justinian

(see Mackeldey, sec 338, p. 247) of later date than the Constitution (Code 4, 35, 23), and for its force it is no sense dependent upon the legislative power of Basil or his successors. "By a later constitution of Justinian, the exceptions" (to which Mackeldey had referred in the text and among them that relied upon by the Solicitor-General) "are repealed." *Posteriore Justiniani constitutione, hæc quidem omnes exceptiones iterum sublatæ sunt, sed hæc constitutio est restituta non glossata*" (Mackeldey, § 338, p. 348, note *c.*). There was a rule in the German Courts, though it certainly has not been observed by the Dutch Commentators, that "*Quicquid glossa non agnoscit illud nec agnoscit curia.*" If, however, the exception relied upon by the Solicitor-General did not exist in the Roman-Dutch Law, as enforced in their Courts, this Court could hardly be able to introduce it here simply upon the ground that the Dutch Courts had recognised as having the force of law an unglossed passage in the Code. Now it is remarkable that the existence of this exception is not admittted when stating the practice of the Courts by the Roman-Dutch authorities which have been cited, though it is mentioned as being one in the Roman Law under the Constitution of Anastasius. Groenewegen would sweep away the whole of the law if he could, and for that matter, so would Bynkershoek and Pothier (see passages referred to by the Judge-President in his judgment). If we refer to Voet (18, 4, 18) where he states the practice of the Courts, we find that he only mentions this exception for the purpose of stating that it does not exist. Van der Keessel does not mention it. I can only think therefore that they must have considered the law contained in Code 3, 35, 24, to be good law and recognised by the Courts, though it happened to be law derived through a restored unglossed passage from a Constitution of Justinian which had come down to them through the *Basilica*. But even if this be not so, it seems from the special case before us that to all intents and purposes the price of the £100 debt was fixed by agreement at £38, and that in payment of a portion only of this amount a debt which the plaintiff owed to the estate of Landman was set off, and therefore the rule would not apply. Returning however to the general question, whether the modified Anastasian law was applicable in Holland, Schorer says that the right of retraction or "*Naasting*" was in vogue in Holland from very early times, and he refers to a charter of 1297, and from Grotius (3, 16, *passim*) the principle of retraction seems to have been applied very generally in the Netherlands to immovables as well as to rights of action. Grotius (3, 16, 14), writing in A D. 1620, lays it down that whenever a debt is sold to a third person, the debtor may at any time (Groenewegen says within a year, basing his opinion upon local laws of Delf and Rhynland) upon receiving notice retract the debt, or in other words step into the place of the purchaser (*om te treden in des koopers plaats*) as he explains the doctrine. Voet lays down the law clearly in 18, 4, 18. "A rule has grown up," he writes, "in our practice, that when a debtor is sued in pursuance of a transferred right of action, he might require the plaintiff to declare on oath for what price he bought the claim, so that the debtor may discharge himself by tendering the same amount, and that the debtor gains all the difference between the amount and the sum originally due is evident from the fact that neither the purchaser nor the vendor is allowed an action for anything beyond the price paid by the latter. (*Quod, utrimque tum emptori, tum venditori actio ultra id, quod emtor dedit denegata est.*) And it is not enough to declare on oath the price promised; he must declare the amount truly and honestly paid or delivered (and here he refers to the passage already referred to, derived from the *Basilica*). And what has been said of sale applies also, according to the better opinion, to delivery of a specific thing by way of payment. (*Et quæ de venditione dicta sunt, in datione in solutum etiam obtinere verius est*) since retraction is allowed in that transaction as in sale, as was stated in the preceding title, and since it is a substitute and equivalent for a sale, and the claim is considered to have been sold for a sum equivalent to the amount of the debt in satisfaction of which it was transferred * * * * (Sec. 19). "Where no particular period is fixed by statute, it is enough for the debtor to tender the same price as that given by the cessionary as soon as he is sued for payment." In the next note (Sec. 20) the exceptions which the Dutch Law allowed are clearly stated: (*a*) "This right of offering or retraction is destroyed if at the time of the sale an opportunity of purchasing was offered to the debtor for the same price and he declined to purchase. (*b*) So also, if the sale be of a number of rights of action collectively (*actionum plurium universitas*) as when a merchant sells his entire list of book-debts, or when many actions are included in an inheritance which is sold; since some of the claims may be valuable and some less valuable, and others absolutely worthless and bad, it is impossible to determine precisely the price paid for each claim nor how much consequently should be paid upon retraction (Dutch Consultations, 4 Con. 195, p. 358). (*c*) Nor is retraction allowed when a debt is sold by public auction and knocked down to the highest bidder. (*d*) Nor, lastly, is the right admissible when rent charges (*renten*) and other claims have been purchased at a cheaper rate owing to the calamities of war and other similar troubles, so that the *purchaser runs the risk of total loss;* since it is but just that the advantage which can be derived from the thing

sold should go to the person who has the disadvantage, and that the hope of gain should belong to him who has the fear of loss. This opinion, after it had been expressed by certain jurisconsults, was confirmed by a decree of the States of Holland, and it has been specially applied to debts of the provinces and states, *sold in critical times during war* for a smaller sum than their nominal value. (Dutch Consultations, 5 Con. 89.) In his Compendium Voet (stating the practice) repeats the same opinion, again relying upon *Lex* 24; but he draws a distinction between debts due by the State, a municipality or a province, and those due by private individuals. [*Nam si nomen, quo respublica vel civitas, aut provincia obligata est distractum sit, sive pluris sive minoris quam erat in sorte debita, exigi potest totum debitum, cum in his apud nos negotiationem quandam exerceri constet. Sed si privati debitoris nomen sit venditum minoris quam erat debitum emptor forte non debiti integri sed tantum pretii soluti exactionem est habiturus convenienter jure Romano, nisi debitori oblata sit actio, eodem pretio retrahenda, isque eam oblatam retrahere recusaverit.*] Now it may be admitted at once that if the reasons advanced by the jurisconsults to whom the Judge-President has referred were strained to their fullest extent, they would destroy the *Lex Anastasiana* altogether, for it is difficult to imagine any case in which credit is given to which a certain amount of risk is not attached. But whatever the reasons may have been which they advanced in the troublous times of 1648, the Dutch lawyers of later times apparently did not press them beyond the case with which they were then dealing, and they allowed the force of the law to continue in practice at least as to private debts, as *Voet* himself tells us.* It seems unnecessary for me to refer again to the authorities cited at the Bar from Sande, Van Leeuwen, Brunemann and Pothier, as I find nothing in them to lead me to suppose that Voet incorrectly stated the law as he found it at the end of the seventeenth (1698) century. A century later Van der Keessel (Thesis 663), who professes "to touch upon such points as had been omitted by Grotius for the sake of conciseness, or had undergone alteration since the publication of the work" (see preface, p. xxviii, Lorenz's Translation) "or had been the subject of controversy," again states the law as still in force, and adds that the right was capable of being exercised even though the debtor was not ignorant of the sale of the debt. He states also two exceptions to the general rule (*Ut nihil amplius accipiat quam ipse vero contractu persolvit*), namely, the case of a sale of the entire body of accounts, and a sale of public Dutch securities. This is the latest authority on the point. Now it is possible that there may be other exceptions to the general rule, for instance where a doubtful right of action is sold, or a doubtful right of heirship, it being understood that it is only a chance that is sold, the vendor not even being answerable for the existence of a debtor, provided he be acting in good faith [see Voet 18, 4, 9, and Mackeldey, who gives as one of the exceptions "*Si nomen cessum tempore cessionis factæ infidum et incertum erat*"; though he tells us in a foot-note that the exception is not contained in the law itself, adding as a reason for it however that a doubtful and uncertain debt is not of the same value as the price named, and that therefore one who pays less for a debt of the kind does not *buy* it for a smaller price]; but upon this question the Court need now express no opinion, as the facts stated do not fall within the limits of this supposed exception. In my opinion the purchaser in the case before us took the usual and ordinary risks which any and every purchaser of a debt takes and no more, and his case does not fall within any of the exceptions existing in the Roman-Dutch Law, nor within the reasoning of the Dutch jurists already cited by the Judge-President. This was not a case of a purchase of a debt during war, nor any similar trouble, nor was this debt of such doubtful character as to fall within the further possible exceptions to which I have alluded. It is unnecessary for me to comment upon the policy of this law. Much may be said both against it and for it. It should not, however, be forgotten that in contracting a debt, a not unimportant consideration is the personality of the creditor, and that the law as it stands does not prevent the sale of debts, even for much less than their nominal value, but merely prohibits the underhand substitution of a new creditor for the person with whom the contract was made without first of all giving the debtor an opportunity of releasing himself from his debt for the very price at which his creditor is willing to dispose of his debt to a third person. It does not prevent the out and out donation of a debt, nor its sale for any price, which the debtor refuses to pay to release himself from it.

It has also the effect of preventing to a considerable extent the trafficking in lawsuits. However, these are matters for the Legislature to consider and not for this Court, which has merely to administer the law as it finds it. In my opinion the plaintiff is only entitled to recover the amount he paid for this debt, together with legal

* At the time these jurisconsults gave their opinion the public debt of the Provinces had reached one hundred and fifty millions of florins, and it was of the utmost importance that the borrowing power of the State should in no sense be damaged by anything which might affect the negotiability of their public debts.

interest upon the sum he paid from the date of payment. As the defendant has not yet tendered this amount to the plaintiff, together with costs up to the date of tender, I am of opinion that he should pay all costs of this action.

Mr. Justice Maasdorp: I concur with my brother Jones in the conclusion he has arrived at in this case; and so thoroughly do I concur also in the reasons which he has advanced for his conclusion, that I do not consider it necessary to make any special statement.

Judgment was accordingly delivered for plaintiff for £38, with interest at 6 per cent. from March 7, 1883, and cost of suits.

SUPREME COURT.

WEDNESDAY, DECEMBER 16.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

*LYONS & SONS V. CAISSAC.

Writ of arrest—Action pending—Appearance entered—Writ discharged.

Sir T. Upington, Q.C., appeared for the plaintiffs, and Mr. Molteno for the defendant.

Mr. Molteno moved, on behalf of defendant, for discharge of a writ of arrest issued against him.

It appeared from defendant's affidavit that he had been arrested as he was on the point of sailing this afternoon for England in the R.M.S. "Norham Castle" at the suit of the plaintiffs for non-payment of the following claims: £15 10s., hire of horses and vehicles; £60, damages for alleged misuse of same; £1 18s. 6d., costs of telegraphing proceedings; and £6 16s. 6d., further costs.

Defendant admitted his liability for £15 10s., but disputed the claim for damages.

The horses and vehicles had been hired in Port Elizabeth, and before the defendant left that town a summons issued out of the Eastern Districts Court for £75 was served upon him.

Defendant signed a warrant to defend the case, which was still pending, and handed it to Mr. Chabaud, of Port Elizabeth, his attorney, through whom he also tendered £45, which tender, however, was refused.

Mr. Molteno contended that under the circumstances disclosed in affidavit, and in sight of the fact that the case was pending in the Eastern Districts Court, the arrest of the defendant was illegal and he was entitled to be discharged from custody.

The Chief Justice said that in cases of this kind, in which the liberty of the subject was at stake, the Court would require very strong evidence that a person in defendant's position was endeavouring to defeat his creditors before it would confirm the writ of arrest. No such evidence had been adduced in the present case, on the contrary the defendant had instructed his attorney to defend the action pending against him, he had further made a tender of £45 according to his affidavit and under the circumstances the Court was of opinion that the defendant should be discharged from custody.

Writ of arrest discharged with costs.

* This case was through an oversight omitted in the report of the 16th Dec., at page 344.—*Ed.*

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If there have been two cessions and the first cession was completed before the execution of the second one the first must prevail

Whatever the rules of the English commen law may have been before 1873, it was a settled rule of the Courts of Equity that anything written, said, or done in pursuance of an agreement and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person amounted to an equitable assignment. The substance of the transaction was looked to, and if the intention of the parties to transfer the *chose in action* or fund to the use of the assignee was manifest, the fact that somewhat inappropriate language was used for the purpose would not be allowed to defeat their intention. Notice, however, to the debtor or holder of the fund was essential to the completion of the assignment

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Per De Villiers, C.J.—*All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by Courts of law, and that debtors do not evade liability in full by reason of their creditors' dealings with their debts, provided only those dealings are bona fide and in accordance with law . . . . . .*

Now, as to any statute enacted by the Legislature of this colony, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate it. If such a statute is no longer required, the Legislature, which must be presumed to be acquainted with the body of its own statute laws, is at hand to enact the repeal. But the body of laws introduced from Holland, including Dutch statutes, stand on a different footing. They are not to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law.

The conclusion at which I have arrived as to

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the obligatory force of the body of Dutch laws existing at the beginning of the present century may be briefly stated. The presumption is that every one of these laws, if applicable to the circumstances of this colony and not repealed by the local Legislature is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usage. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well-established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by judicial decision may fairly be held to have been abrogated by disuse. The law of retraction as applied to the sale of debts is inconsistent with the reasonable and well-established custom of persons engaged in commerce in this country, and, until the recent decision in the Eastern Districts Court, it had not been recognised and acted upon by the superior Courts of the Colony, although numerous cases must have arisen to which it was applicable. It had therefore practically been abrogated by disuse and was not revived by that judgment

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Per de Villiers, C.J.—*No doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them*

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